

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/1. INTRODUCTION/1. Scope of international relations law.

## **INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)**

### **1. INTRODUCTION**

#### **1. Scope of international relations law.**

International relations law, sometimes called foreign relations law, is that part of English law which governs the international relations of the United Kingdom. It includes what international lawyers refer to as domestic or municipal law, which is to say for these purposes, the law of England and Wales and the provisions of the law of other jurisdictions within the UK which are also relevant to the UK's international relations.

Since public international law is, at least to some extent, part of the law of England<sup>1</sup>, or may otherwise fall to be considered in the application of English law, the present title also covers, in outline at least and with selected references to other materials, some areas of public international law that are likely to come before English lawyers and the English courts.

When the English courts are called upon to apply international law, it seems to be well established that they will apply that law faithfully according to its own rules<sup>2</sup>.

Certain topics which would otherwise fall within the scope of this title are to be found elsewhere in this work<sup>3</sup>.

1 For the relationship between public international law and English law see PARA 12 et seq; and as to the conduct of international relations see PARA 26 et seq.

2 I.e the rules concerning sources (see PARA 2 et seq); and treaties (see PARA 71 et seq).

3 See particularly **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM; COMMONWEALTH; EXTRADITION; PRIZE; WAR AND ARMED CONFLICT.**

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/2. PUBLIC INTERNATIONAL LAW/(1) SOURCES OF INTERNATIONAL LAW/(i) Preliminary/2. In general.

## **2. PUBLIC INTERNATIONAL LAW**

### **(1) SOURCES OF INTERNATIONAL LAW**

#### **(i) Preliminary**

##### **2. In general.**

The International Court of Justice<sup>1</sup>, in the exercise of its function to decide such disputes as are submitted to it in accordance with international law, applies the following:

- 1 (1) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states<sup>2</sup>;
- 2 (2) international custom, as evidence of a general practice accepted as law<sup>3</sup>;
- 3 (3) the general principles of law recognised by civilized nations<sup>4</sup>; and
- 4 (4) as subsidiary means for the determination of rules of law, judicial decisions and the teachings of the most highly qualified publicists of the various nations<sup>5</sup>.

As such, these are widely accepted as an authoritative statement of the sources of public international law. However, unilateral declarations<sup>6</sup> and decisions of international organisations may be other sources of international law<sup>7</sup>. Although treaties and customary international law provide much of the basis for public international law, in general, there is no hierarchy among the sources<sup>8</sup>.

1 As to the International Court of Justice see PARA 499 et seq.

2 See the Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 38 para 1(a); and PARA 3. As to art 38 see Zimmerman et al *The Statute of the International Court of Justice: A Commentary* (1st Edn, 2006) pp 677-792.

3 See the Statute of the International Court of Justice art 38 para 1(b); and PARA 4.

4 See the Statute of the International Court of Justice art 38 para 1(c); and PARA 5.

5 See the Statute of the International Court of Justice art 38 para 1(d); and PARAS 6, 7.

6 See PARA 8.

7 See PARA 9.

8 See PARA 10 et seq.

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## **(ii) Sources listed in the Statute of the International Court of Justice**

### **3. Treaties.**

The Statute of the International Court of Justice lists among the sources of public international law 'international conventions, whether general or particular, establishing rules expressly recognised by the contesting states'<sup>1</sup>. 'International conventions' in this context refers to treaties that are in force and binding on the states concerned under international law<sup>2</sup>. The general rule is that a treaty is only binding upon states party to it<sup>3</sup>, although the rules laid down in a treaty may, even if the treaty does not enter into force, become part of customary international law<sup>4</sup>. A treaty may also codify existing customary international law, or crystallise an emerging rule of customary international law and in such case the latter is the source of the law<sup>5</sup>.

1 See the Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 38 para 1(a).

2 As to treaties see PARA 71 et seq.

3 See the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 34; and PARA 99.

4 See the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 38; and PARA 99.

5 For further discussion on the relationship between treaties and customary international law see *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* ICJ Reports 1969, 3; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Reports 1986, 14.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/2. PUBLIC INTERNATIONAL LAW/(1) SOURCES OF INTERNATIONAL LAW/(ii) Sources listed in the Statute of the International Court of Justice/4. Customary international law.

#### 4. Customary international law.

The Statute of the International Court of Justice lists among the sources of public international law 'international custom, as evidence of a general practice accepted as law'<sup>1</sup>. This refers to customary international law<sup>2</sup>. Customary international law is to be distinguished from mere usage, in that it arises from state practice coupled with a conviction on the part of the states in question that it is required by or is in conformity with international law<sup>3</sup>. State practice takes many forms, and includes what states do, what they say, and what they say about what they do. The practice of an increasing number of states is now published regularly<sup>4</sup>. The English courts will have regard to a wide range of materials in determining rules of customary international law<sup>5</sup>.

1 See the Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 38 para 1(b).

2 Also called 'international customary law', 'international custom', 'custom' and 'general international law', though the last of these terms is used with various meanings. Customary international law may be universal, regional (local) or even bilateral: see *Asylum (Colombia/Peru)* ICJ Reports 1950, 266; *Right of Passage over Indian Territory (Portugal v India)* ICJ Reports 1960, 6.

3 Thus it is widely accepted that two elements are required for the formation of a rule of customary international law, state practice and *opinio juris sive necessitates (opinio juris)*: see generally the *Lotus Case* PCIJ Ser A No 10 (1927); *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* ICJ Reports 1969, 3.

4 For a compilation of British practice, see United Kingdom Materials in International Law published in British Yearbook of International Law (BYIL) from 1978 onwards.

5 See eg *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136 at [13]-[19] per Lord Bingham.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/2. PUBLIC INTERNATIONAL LAW/(1) SOURCES OF INTERNATIONAL LAW/(ii) Sources listed in the Statute of the International Court of Justice/5. General principles of law.

## **5. General principles of law.**

The Statute of the International Court of justice lists among the sources of public international law 'the general principles of law recognised by civilized nations'<sup>1</sup>. This refers to general principles of law as applied in domestic legal systems, including by domestic courts<sup>2</sup>.

1 See the Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 38 para 1(c).

2 See generally Cheng *General Principles of Law as Applied by International Courts and Tribunals* (1st Edn, 1953 (reissued 2006)).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/2. PUBLIC INTERNATIONAL LAW/(1) SOURCES OF INTERNATIONAL LAW/(ii) Sources listed in the Statute of the International Court of Justice/6. Judicial decisions.

## **6. Judicial decisions.**

The Statute of the International Court of Justice lists judicial decisions as a subsidiary means for the determination of rules of public international law, subject to the condition that a decision of the Court has no binding force except between the parties and in respect of that particular case<sup>1</sup>.

See the Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) arts 38 para 1(d), 59.

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## 7. Writings.

The Statute of the International Court of Justice lists 'the teachings of the most highly qualified publicists of the various nations' as a subsidiary means for the determination of rules of public international law<sup>1</sup>. This refers to writings of learned authors on public international law, to which the courts make frequent reference<sup>2</sup>. The product of collective bodies, such as the draft articles with commentaries of the International Law Commission of the United Nations, may be viewed as particularly authoritative, depending on their reception by states<sup>3</sup>.

1 See the Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 38 para 1(d). See also Wood 'Teachings of the Most Highly Qualified Publicists (Art 38(1) ICJ Statute)' *The Max Planck Encyclopaedia of Public International Law*.

2 See eg *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 3 All ER 28, [2008] 2 WLR 31, at [81]-[82] per Lord Rodger.

3 See eg *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2006] UKHL 26, [2007] 1 AC 270, [2007] 1 All ER 113 at [12] per Lord Bingham; *R (on the application of Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, [2007] QB 621, [2006] 3 WLR 954 at [66] per Brooke LJ (affd *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 3 All ER 28, [2008] 2 WLR 31).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/2. PUBLIC INTERNATIONAL LAW/(1) SOURCES OF INTERNATIONAL LAW/(iii) Other Sources/8. Unilateral declarations.

### **(iii) Other Sources**

#### **8. Unilateral declarations.**

Under international law, declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. When it is the intention of the state making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal obligation<sup>1</sup>.

<sup>1</sup> *Nuclear Tests (Australia v France)* ICJ Reports 1974, 253 at 267-268 (paras 43-46); *Nuclear Tests (New Zealand v France)* ICJ Reports 1974, 457 at 472-473 (paras 46-49); *Frontier Dispute (Burkina Faso/Republic of Mali)* ICJ Reports 1986, 554 at 573-574 (paras 39-40); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility)* ICJ Reports 2006, 6 at 26-29 (paras 45-53). See also the Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations, with commentaries, International Law Commission Report, 58th Session, A/61/10; YILC 2006, vol II(2).



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/2. PUBLIC INTERNATIONAL LAW/(1) SOURCES OF INTERNATIONAL LAW/(iii) Other Sources/9. Decisions of international organisations.

## **9. Decisions of international organisations.**

Binding decisions of the United Nations Security Council impose obligations on states under international law<sup>1</sup>.

<sup>1</sup> As to the decisions of the Security Council see PARAS 522, 527. Various means exist for effect to be given to them at the domestic level, in particular the United Nations Act 1946: see PARA 526 et seq.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/2. PUBLIC INTERNATIONAL LAW/(2) HIERARCHY IN INTERNATIONAL LAW/10. Primacy of the Charter of the United Nations.

## **(2) HIERARCHY IN INTERNATIONAL LAW**

### **10. Primacy of the Charter of the United Nations.**

The Charter of the United Nations<sup>1</sup> provides that in the event of a conflict between the obligations of the members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter must prevail<sup>2</sup>. Obligations under the Charter include those flowing from binding decisions of the Security Council of the United Nations<sup>3</sup>. The effect the Charter's primacy is to suspend, not terminate, conflicting obligations, and only to the extent of the conflict. It applies to all other obligations including those under human rights treaties and under customary international law, with the possible exception of peremptory norms<sup>4</sup>.

1    Ie the Charter of the United Nations (San Francisco 25 June 1945; TS 67 (Cmd 7015)).

2    See the Charter of the United Nations art 103.

3    *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Provisional Measures)* ICJ Reports 1992, 3. The Charter of the United Nations art 103 has been applied in English cases: see eg *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 3 All ER 28, [2008] 2 WLR 31.

4    The Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmd 7964) art 30(1) acknowledges the compelling force of art 103: see PARA 92; and *R (on the application of Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, [2007] QB 621, [2006] 3 WLR 954 at [72] per Brooke LJ (affd *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 3 All ER 28, [2008] 2 WLR 31). As to peremptory norms see PARA 11.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/2. PUBLIC INTERNATIONAL LAW/(2) HIERARCHY IN INTERNATIONAL LAW/11. Peremptory norms and obligations owed to the international community as a whole.

## **11. Peremptory norms and obligations owed to the international community as a whole.**

A peremptory norm of general international law, sometimes termed 'jus cogens', is accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character<sup>1</sup>. The criteria for identifying peremptory norms are stringent; those that are clearly accepted and recognised include the prohibitions of aggression, genocide, slavery and racial discrimination, crimes against humanity and torture, and the right of self-determination<sup>2</sup>.

There are also certain obligations under international law, usually termed 'erga omnes', that a state owes to the international community as a whole<sup>3</sup>. Whilst there is some overlap in the substance of the obligations concerned, the concept of obligations erga omnes is distinct from that of peremptory norms of general international law<sup>4</sup>.

1 The International Court of Justice expressly recognised the existence of peremptory norms for the first time in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility)* ICJ Reports 2006, 6. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 147). See also the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 53; and PARA 103.

2 *R (on the application of Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, [2007] QB 621, [2006] 3 WLR 954 at [66] per Brooke LJ (affd *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 3 All ER 28, [2008] 2 WLR 31).

3 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 32 (paras 33-34). Following the identification by the International Court of Justice of the outlawing of acts of aggression, the prohibition of genocide, and the 'principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination' as constituting obligations which are owed to the international community as a whole, are the concern of all states and in relation to which all states have a legal interest in their protection, the International Court of Justice has referred to the concept of obligations erga omnes on a number of other occasions and identified a number of other norms which fall into the category: see *East Timor (Portugal v Australia)* ICJ Reports 1995, 90 at 102 (self-determination of peoples); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections)* ICJ Reports 1996, 595 at 615-616 (para 31) (prohibition of genocide); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 199 (paras 155-157) (right to self-determination and certain obligations under international humanitarian law); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility)* ICJ Reports 2006, 6 (paras 64-70) (prohibition of genocide); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (paras 147, 161 and 185) (prohibition of genocide). Nevertheless, the International Court of Justice has made clear that the fact that an obligation is owed erga omnes does not constitute an exception to the principle that jurisdiction must be based on consent: see eg *East Timor (Portugal v Australia)* ICJ Reports 1995, 90 at 102 (para 29); and *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility)* ICJ Reports 2006, 6 (para 125).

4 See generally Tams *Enforcing Obligations Erga Omnes in International Law* (2005).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/3. PUBLIC INTERNATIONAL LAW AND ENGLISH LAW/(1) GENERAL CONSIDERATIONS/12. International law and national legal systems.

### **3. PUBLIC INTERNATIONAL LAW AND ENGLISH LAW**

#### **(1) GENERAL CONSIDERATIONS**

##### **12. International law and national legal systems.**

International law is a legal system distinct from the legal systems of the national states. The relationship between any particular national legal system and international law is a matter regulated by the national law in question, often by the constitutional law of the state concerned. International law requires that a state must comply with its international obligations in good faith<sup>1</sup>, which means, among other things, that each state must have the legal means to implement such of its international obligations as require action in national law. In some cases undertaking an international obligation will require a state to modify its domestic law, although, initially, it is for each state to judge what action is required. Where a state accepts that international obligations may be created for it from time to time by organs of international organisations of which it is a member<sup>2</sup>, it must be able to give effect to each decision in its domestic law when such action is necessary<sup>3</sup>. A state may not rely on an insufficiency in its domestic law as a justification for failing to comply with an international obligation<sup>4</sup>. However, international law does not, of its own effect, have an impact directly in national law so that, for instance, rules of national law which are incompatible with a state's international obligations will remain valid instruments in national law<sup>5</sup>.

1 See the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 26; and Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, principle 7, General Assembly Resolution 2625 (XXV) of 24 October 1970.

2 Eg the powers of the Security Council: see the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 4(1) Chs V, VII (see PARA 523).

3 Eg in the case of the United Kingdom, the United Nations Act 1946 (see PARA 526).

4 See the Vienna Convention on the Law of Treaties, art 27.

5 The integration of EU law and the national laws of member states is a quite exceptional international law regime.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/3. PUBLIC INTERNATIONAL LAW AND ENGLISH LAW/(1) GENERAL CONSIDERATIONS/13. The constitutional context.

### **13. The constitutional context.**

The informality of the United Kingdom's constitutional arrangements introduces a degree of uncertainty into explaining the relationship between international law and domestic law<sup>1</sup>. The overriding principle of parliamentary sovereignty means that in no case may the express words of a statute be limited by reference to international law<sup>2</sup>. Of almost equal weight is the need for democratic legitimacy for acts of law-making, specifically that the executive has no power to make law or dispense with it by its acts alone<sup>3</sup>. It is a principle which has particular salience for the creation of criminal liability<sup>4</sup>. Given the primary role of the government in making international law, this is a factor of some significance, since the government has the power to bind the state in international law without having the power to secure the implementation of its obligations in domestic law, if that is necessary. Furthermore, the government's powers to conduct international relations<sup>5</sup>, including acts which create obligations in international law, are in large part found within the prerogative and may be to a limited extent susceptible to judicial scrutiny<sup>6</sup>. The basic rules which govern the relationship between international law and domestic law should, therefore, be read subject to these considerations.

The basic rules may be stated succinctly. Treaties, being made by the executive alone, have no effect in English law unless, and then only to the extent that, they are implemented by legislation<sup>7</sup>. Customary law, in contrast, is said to be 'part of the law of England', which the courts may rely on without legislative intervention<sup>8</sup>. These practices represent the English law contribution to what has been described as the 'harmonisation' of relations between international law and domestic law, subject to the constitutional powers of national courts<sup>9</sup>.

These bald propositions do not, however, give a complete explanation of the relationship between international law and domestic law. First, it is a presumption of statutory interpretation that Parliament does not intend to legislate contrary to the United Kingdom's existing international obligations<sup>10</sup>. There is an equivalent principle that the courts should develop the common law in a way compatible with the United Kingdom's duties in international law<sup>11</sup>. Under neither version is there a presumption or prohibition against the exercise of administrative powers contrary to international law<sup>12</sup>. Where the disposition of a case under other rules of law requires the determination of an issue of international law, the courts will use this 'point of reference' as the basis for considering the relevant international law, without regard to the formal rules set out above. In particular, there is no obstacle to consideration of treaties which have not been implemented in the United Kingdom or, indeed, to which it is not even a party<sup>13</sup>. This power has been extended in recent years by increasing reliance on the supplementary aids to interpretation of treaties set out in the Vienna Convention on the Law of Treaties<sup>14</sup>, where the English courts have followed the International Court of Justice in looking at subsequent practice and other relevant international obligations<sup>15</sup>.

When the English courts have the power to look at the wider international law context, they make little reference to the formal relationship between the rules of international law and domestic law<sup>16</sup>, but frequently refer to the 'subsidiary means' for the determination of rules of international law, judicial decisions, including those of international courts, and academic writing<sup>17</sup>.

Finally, in some cases, the English court will not apply international law, even though ostensibly directed to do so by its ordinary rules because of considerations of non-justiciability<sup>18</sup> or the 'foreign act of state' doctrine<sup>19</sup>.

1 See Sales and Clement 'International Law in Domestic Courts: The Developing Framework' (2008) 124 LQR 388.

2 *Cheney v Conn (Inspector of Taxes)* [1968] 1 All ER 779, [1968] 1 WLR 242; *R v Asfaw* [2008] UKHL 31, [2008] 1 AC 1061, [2008] 3 All ER 775. In addition, the Executive may exercise its powers without regard to unimplemented international law, even in breach of an obligation (*R (on the application of Corner House Research) v Director of the Serious Fraud Office (BAE Systems plc, interested party)* [2008] UKHL 60, [2009] 1 AC 756, [2008] 4 All ER 927, [2009] Crim LR 47) and the courts do not have a role to secure compliance with unimplemented obligations of the UK (*R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, [2004] 4 All ER 1028 at [40]). See also, however, *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42, sub nom *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, HL.

3 See *The Parlement Belge* (1879) 4 PD 129, 3 BILC 305 (on appeal (1880) 5 PD 197, 3 BILC 322, CA but without affecting the judgment of Sir Robert Phillimore); and *Rayner (J H) (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523.

4 See *R v Jones* [2006] UKHL 16, [2007] 1 AC 136, [2006] 2 All ER 741 at [59]-[67], although the crucial question of whether or not the UK was obliged by international law to make planning etc a war of aggression a crime was not considered.

5 As to the conduct of international relations see PARA 26 et seq.

6 *Council of Civil Service Trade Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, HL. As to the royal prerogative see also **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

7 As to the implementation of treaties see PARA 18 et seq.

8 See IV Blackstone's Commentaries on the Laws of England, Chapter 5. Such reliance remains subject to the discussed constitutional principles: see the text and notes 1-6. See also PARA 16.

9 See O'Connell *International Law* (2nd ed, 1970) pp 51-54. Domestic legislation or rules of the common law may coincide with international law, so that no action is required for domestic law to be compatible with the state's international obligations: see eg *Masri v Consolidated Contractors International Co SAL* [2009] UKHL 43, [2009] 4 All ER 847, [2009] 3 WLR 385 (the principle of territoriality as a rule of statutory interpretation); *Air India v Wiggins* [1980] 2 All ER 593, [1980] 1 WLR 815 (principle of territoriality as the basis for criminal liability); and *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169 (prohibition of torture at common law).

10 *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, [1990] 1 All ER 469.

11 See generally *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169; and *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406.

12 *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, [1990] 1 All ER 469.

13 Including, for example, the unimplemented provisions of the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015); see also *Republic of Ecuador v Occidental Exploration and Petroleum Co* [2005] EWCA Civ 1116, [2006] QB 432, [2006] 2 All ER 225.

14 Ie the Vienna Convention of the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmd 7964) art 31: see PARA 95 et seq.

15 See eg *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* ICJ Reports 1971, 16 at 22 (para 22); *Oil Platforms (Islamic Republic of Iran v United States)* ICJ Reports 2003, 161 at 182-183 (para 42). As to the International Court of Justice see PARA 499 et seq. This is a practice which has been relied on extensively in the application of the Human Rights Act 1998 (as to which see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**), which gives effect to some of the provisions of the European Convention on Human Rights, following the European Court of Human Rights' practice of examining a wide international law context when interpreting the Convention: *R (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, [2007] 3 All ER 685; *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, [2008] 3 All ER 28; *Application 35763/97 Al-Adsani v United Kingdom* (2001) 34 EHRR 273, ECtHR; *Application 52207/99 Bankovic v Belgium* (2002) 11 BHRC 435, ECtHR.

16 See *R (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, [2007] 3 All ER 685 at [46]-[49] per Lord Rodger, referring to various international legal rules on jurisdiction.

17 See *R (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, [2007] 3 All ER 685.

18 See PARAS 24, 25.

19 See PARA 23.

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#### 14. Proving international law in the English courts.

International law is proved by argument before the court as a matter of law, not, as in the case of foreign law, by the calling of expert evidence, proving the foreign law as a matter of fact<sup>1</sup>. Recently, the courts have admitted witness statements from Foreign Office lawyers concerning the condition of international law or the government's view of the United Kingdom's obligations in international law<sup>2</sup>. The government has the power under the prerogative and under statute to certify conclusively on certain matters of fact bearing on the exercise of its powers relating to international law<sup>3</sup>. Subject to stringent conditions of justiciability and standing, customary international law may be invoked against the British government<sup>4</sup>. Prize courts apply rules of international law, whether derived from custom or from treaty directly<sup>5</sup>. Judgments of international courts are admissible either because legislation so provides<sup>6</sup> or as evidence as to the condition of international law<sup>7</sup>.

1 As to proof of foreign law see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 28 et seq.

2 *Kuwait Airways Corpn v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883, [2002] 3 All ER 209 at [114] (referring to a letter from the FCO Legal Adviser about the legal position of the government); and *Aziz v Aziz* [2007] EWCA Civ 712, [2008] 2 All ER 501, (where the Foreign Office submitted a written statement about international law).

3 The evidence is presented by an 'Executive Certificate' under the hand of the Foreign Secretary: see generally PARA 15.

4 *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), (2002) Times, 27 December, [2003] 3 LRC 335 at [36] (justiciability), [48] (standing), per Simon Brown LJ; *R (on the application of Al-Haq) v the Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin) at [48] (obiter) per Pill LJ (doubting whether the applicants had standing), [61] (obiter) per Cranston J (accepting standing).

5 *The Zamora* [1916] 2 AC 77, PC; and see *The Maria* (1799) 1 Ch Rob 340; *The Elsebe* (1804) 5 Ch Rob 173; *The Recovery* (1807) 6 Ch Rob 341; *The Odessa* [1915] P 52 (affd [1916] 1 AC 145, PC); and **PRIZE**.

6 See eg the Human Rights Act 1998 s 2(1)(a); and **CIVIL PROCEDURE** vol 11 (2009) PARA 102.

7 See the Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 38(1); and PARA 509. Judgments of foreign courts may be very useful in interpreting harmonisation treaties: *Morris v KLM Royal Dutch Airlines*, *King v Bristow Helicopters Ltd* [2002] UKHL 7, [2002] 2 AC 628, [2002] 2 All ER 565 at [81]; *Corocraft v Pan-American Airways Inc* [1969] 1 QB 616 at 655 per Denning LJ, [1969] 1 All ER 82, [1968] 1 WLR 1273, CA.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/3. PUBLIC INTERNATIONAL LAW AND ENGLISH LAW/(1) GENERAL CONSIDERATIONS/15. 'Facts of state'.

## 15. 'Facts of state'.

There is a class of facts, which may be termed 'facts of state'<sup>1</sup>, which consists of matters the determination of which is solely in the hands of the executive. Examples of 'facts of state' are:

- 5 (1) whether a state of war exists between Her Majesty and another state<sup>2</sup>, and if so, when it began<sup>3</sup>;
- 6 (2) whether a state of war exists between other states<sup>4</sup>;
- 7 (3) whether a particular territory is hostile<sup>5</sup>, or foreign<sup>6</sup>, or within the boundaries of a particular state<sup>7</sup>;
- 8 (4) whether the Crown claims that a place is within its dominions<sup>8</sup>;
- 9 (5) whether British jurisdiction exists in any particular foreign place<sup>9</sup>;
- 10 (6) whether an entity claiming to be a foreign state has been recognised as such by the Crown<sup>10</sup>, and formerly whether and when a particular entity was recognised as the government of an independent sovereign state<sup>11</sup> and now, the dealings the Crown has with the government of a foreign state<sup>12</sup>;
- 11 (7) whether an entity is entitled to state immunity<sup>13</sup>;
- 12 (8) the status of property which is the subject of claims by a foreign state to immunity<sup>14</sup>;
- 13 (9) the status of a person claiming immunity from the jurisdiction on the ground of his diplomatic status<sup>15</sup>; and
- 14 (10) the status of British and allied armed forces<sup>16</sup>.

The court will take notice of such facts of state, and for this purpose, in any case of uncertainty, will seek information from the executive, and the information received is conclusive<sup>17</sup> except in cases where what is involved is the construction of some term in a commercial document<sup>18</sup> or an Act of Parliament<sup>19</sup>. Statute apart, the power of conclusive certification is restricted to matters of fact.

1 Harrison Moore's Act of State in English Law (1906) pp 33-39.

2 *Esposito v Bowden* (1857) 7 E & B 763 at 793, Ex Ch, per Willes J.

3 *Blackburne v Thompson* (1812) 15 East 81 at 90-91 per Lord Ellenborough CJ; *Driefontein Consolidated Gold Mines v Janson, West Rand Central Gold Mines Co v De Rougemont* [1900] 2 QB 339, 4 BILC 666 (affd sub nom *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484, 4 BILC 682, HL). The municipal courts have no power to inquire into the correctness of a declaration by the Crown that a state of war exists (*Blackburne v Thompson* (1812) 15 East 81) or whether it has ended (*R v Bottrill, ex p Kuechenmeister* [1947] KB 41, [1946] 2 All ER 434, 1 BILC 11, CA).

4 *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co Ltd* [1939] 2 KB 544, [1939] 1 All ER 819, CA.

5 *Blackburne v Thompson* (1812) 15 East 81 at 90-91 per Lord Ellenborough CJ; and see *The Manilla* (1808) Edw 1, 2 BILC 7; *The Pelican* (1809) 1 Edw App D iv, 1 BILC 1, PC.

6 *Direct United States Cable Co Ltd v Anglo-American Telegraph Co Ltd* (1877) 2 App Cas 394, 2 BILC 892, PC.

7 *Foster v Globe Venture Syndicate Ltd* [1900] 1 Ch 811, 1 BILC 2; and see *Duff Development Co Ltd v Kelantan Government* [1924] AC 797 at 826-827, 3 BILC 216, HL, per Lord Sumner.

8 *The Fagernes* [1927] P 311, 2 BILC 914, CA.

9 *North Charterland Exploration Co (1910) Ltd v R* [1931] 1 Ch 169; *R v Campbell, ex p Ahmed Hamid Moussa* [1921] 2 KB 473, 4 BILC 524, DC; *Ex p Mwenya* [1960] 1 QB 241 at 280, [1959] 3 All ER 525 at 542, 7 BILC 424, CA. See also the Foreign Jurisdiction Act 1890 s 4; and **COMMONWEALTH** vol 13 (2009) PARA 708.

10 *Carl Zeiss Stiftung v Rayner and Keeler Ltd* [1967] 1 AC 853, sub nom *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1966] 2 All ER 536, HL; *Gur Corpn v Trust Bank of Africa Ltd* [1987] QB 599, [1986] 3 All ER 449, CA).

11 See eg *The Charkieh* (1873) LR 4 A & E 59, 3 BILC 847; *Mighell v Sultan of Johore* [1894] 1 QB 149, 3 BILC 170, CA; *Carr v Fracis, Times & Co* [1902] AC 176, 2 BILC 823, HL; *Statham v Statham and Gaekwar of Baroda* [1912] P 92, 3 BILC 178; *The Gagara* [1919] P 95, 2 BILC 71, CA; *The Annette, The Dora* [1919] P 105, 2 BILC 76; *The Jupiter* [1924] P 236, 3 BILC 378; *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, 2 BILC 97, CA; *Duff Development Co Ltd v Kelantan Government* [1924] AC 797, 3 BILC 216, HL; *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] Ch 513, [1937] 3 All ER 8, 2 BILC 146; *Haile Selassie v Cable and Wireless Ltd* [1938] Ch 839, [1938] 3 All ER 384, 3 BILC 165, CA; *Haile Selassie v Cable and Wireless Ltd (No 2)* [1939] Ch 182, [1938] 3 All ER 677, 2 BILC 171, CA; *Banco de Bilbao v Sancha, Banco de Bilbao v Rey* [1938] 2 KB 176, [1938] 2 All ER 253, 2 BILC 152, CA; *Government of the Republic of Spain v SS Arantzazu Mendi* [1939] AC 256, [1939] 1 All ER 719, 2 BILC 198, HL; *Lorentzen v Lydden & Co Ltd* [1942] 2 KB 202, 1 BILC 476; *A/S Tallinna Laevauhisus v Tallinna Shipping Co Ltd* (1946) 79 Ll L Rep 245, 1 BILC 485; *Civil Air Transport Inc v Central Air Transport Corpn* [1953] AC 70, [1952] 2 All ER 733, 7 BILC 523, PC; *Kahan v Pakistan Federation* [1951] 2 KB 1003, 7 BILC 689; *Sultan of Johore v Abubakar Tunku Aris Bendahar* [1952] AC 318, [1952] 1 All ER 1261, 7 BILC 667, PC; *Sayce v Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State* [1952] 2 QB 390, [1952] 2 All ER 64, 7 BILC 662, CA; *Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna v Boguslawski* [1953] AC 11, [1952] 2 All ER 470, 7 BILC 499, HL; *Carl Zeiss Stiftung v Rayner and Keeler Ltd* [1967] 1 AC 853, sub nom *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1966] 2 All ER 536, HL.

12 See *Republic of Somalia v Woodhouse Drake and Carey (Suisse) SA* [1993] QB 54, [1993] 1 All ER 371; *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] 2 All ER 821.

13 See the State Immunity Act 1978 s 21; and PARA 245.

14 *The Parlement Belge* (1879) 4 PD 129, 3 BILC 305; revsd (1880) 5 PD 197, 3 BILC 322, CA.

15 *Engelke v Musmann* [1928] AC 433, 6 BILC 129, HL. See now the Diplomatic Privileges Act 1964 s 4; the Consular Relations Act 1968 s 11; the International Organisations Act 1968 s 8; and PARAS 282, 297, 323.

16 *Holdowanski v Holdowanska* [1956] 3 All ER 457, [1956] 3 WLR 935 (revsd sub nom *Taczanowska v Taczanowski* [1957] P 301, [1957] 2 All ER 563, CA); *Preston v Preston* [1963] P 141 (affd [1963] P 411, [1863] 2 All ER 405, CA).

17 *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797, 3 BILC 216, HL; but there is no rule of law compelling the executive to answer a question: *White, Child and Beney Ltd v Eagle Star and British Dominions Insurance Co, White, Child and Beney Ltd v Simmons* (1922) 127 LT 571, 2 BILC 126, CA.

18 *Luigi Monta of Genoa v Cechofracht Co Ltd* [1956] 2 QB 552, [1956] 2 All ER 769, 7 BILC 540 (information not conclusive for purposes of interpreting the word 'government' in a war risks clause); *Reel v Holder* [1981] 3 All ER 321, [1981] 1 WLR 1226, CA (not conclusive as to interpretation of rules of the International Amateur Athletics Association). See also *Spinney's (1948) Ltd v Royal Insurance Co* [1980] 1 Lloyd's Rep 406 (information not sought on whether fighting in Lebanon constituted 'civil war' for the purpose of an insurance contract).

19 *Re Al-Fin Corpn's Patent* [1970] Ch 160, [1969] 3 All ER 396, 9 BILC 1, disapproving *Re Harshaw Chemical Co's Patent* [1965] RPC 97, 8 BILC 1 (meaning of 'foreign state' as used in the Patents Act 1949 s 24(2) (repealed)).

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## (2) CUSTOMARY INTERNATIONAL LAW AND ENGLISH LAW

### 16. Customary international law and English law.

In numerous cases in the English courts it has been stated that customary international law is incorporated into and forms part of the law of England (the doctrine of incorporation)<sup>1</sup>. In other cases it has been said that international law is only part of English law in so far as the rules of the former system have been accepted by this country and are recognised by the English courts as having been transformed into rules of English law (the doctrine of transformation)<sup>2</sup>. While the English courts have resisted a simple answer to the question of which doctrine is to be preferred<sup>3</sup>, the prevailing view appears to be a single rule of the common law allowing the courts to use the rules of customary international law as the basis for their decisions<sup>4</sup>. Each rule of customary international law may be given effect in this way so that the right-holder in international law (usually a state or its organs) may rely on it as a cause of action, a defence or as providing an immunity<sup>5</sup>. Like all rules of the common law, the reception of customary international law is subject to constitutional constraints, and customary international law may not be given effect contrary to the plain words of a statute, nor may it be used as the basis for establishing criminal liability in domestic law<sup>6</sup>.

Customary international law does not provide grounds for challenging before the courts the exercise of powers of the British government under the prerogative which remain beyond domestic judicial scrutiny<sup>7</sup>. A remedy sought on the basis of the rule of customary international law must be one which it is within the capacity of the courts to give<sup>8</sup>. The traditional rule has come in for criticism<sup>9</sup>. It will be for the person asserting the rule to prove that it exists as alleged by demonstrating that there is evidence which would satisfy the international law test of custom<sup>10</sup>. The English courts have been troubled by what they perceive as the uncertainty of customary international law<sup>11</sup>.

1 This was stated in numerous cases decided between 1737 and 1861: see eg *Barbuit's case* (1737) Cas temp Talb 281, 6 BILC 261; *Triquet v Bath* (1764) 3 Burr 1478, 6 BILC 211; *Heathfield v Chilton* (1767) 4 Burr 2015, 6 BILC 216; *Dolder v Lord Huntingfield* (1805) 11 Ves 283, 2 BILC 1; *Viveash v Becker* (1814) 3 M & S 284, 6 BILC 264; *Wolff v Oxholm* (1817) 6 M & S 92, 1 BILC 201; *Novello v Toogood* (1823) 1 B & C 554, 6 BILC 221; *De Wutz v Hendricks* (1824) 2 Bing 314, 6 BILC 771; *Emperor of Austria v Day and Kossuth* (1861) 3 De GF & J 217, 1 BILC 45. The later case of *R v Keyn* (1876) 2 ExD 63, 2 BILC 701, CCR, is sometimes said to demonstrate the abandonment of the doctrine of incorporation, but the customary rule in the case was permissive: whether or not a coastal state could exercise criminal jurisdiction over the acts of aliens on foreign-flag ships in its territorial sea. There was no provision of English law which allowed the exercise of such a jurisdiction, even if it were a permitted act by international law. There was no jurisdiction at common law and no statutory action having been taken, the courts could not exercise a power which had not been conferred on them in national law. Also, it may have been that the court was uncertain as to whether there was a clear rule of international law permitting a state to exercise jurisdiction over aliens for criminal offences committed in its territorial sea. The effect of the decision was changed by the Territorial Waters Jurisdiction Act 1878 s 3 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1056). It has been noted that while there is 'old and high authority' for the proposition that 'the law of nations to its full extent is part of the law of England and Wales' it is nonetheless difficult 'to accept this proposition in quite the unqualified terms in which it has often been stated': *R v Jones* [2006] UKHL 16, [2007] 1 AC 136, [2006] 2 All ER 741 at [11] per Lord Bingham (concerned with a crime under customary international law). See also O'Keefe 'The Doctrine of Incorporation Revisited' (2008) 79 BYIL 7.

Note also that the language used to describe the relationship between English law and international law is not consistent. When referring to treaties 'incorporation' requires an Act of Parliament giving effect to some or all of the terms of the treaty in national law. Treaties for which there is no incorporating legislation are accordingly referred to as 'unincorporated'. As to the implementation of treaties see generally PARA 18.

2 See eg *West Rand Central Gold Mining Co Ltd v R* [1905] 2 KB 391 at 406, 2 BILC 283, DC, per Lord Alverstone CJ; *Mortensen v Peters* (1906) 8 F 93, Ct of Sess, 3 BILC 754; *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271 at 295, CA, per Atkin LJ; *Chung Chi Cheung v R* [1939] AC 160 at 168, [1938] 4 All ER 786 at 790, 3 BILC 96, PC. However, these cases are not unequivocal, and might support the doctrine of incorporation: see Brownlie's Principles of Public International Law (7th Edn) 41-45; and see also *R v Secretary of State for the Home Department, ex p Thakrar* [1974] QB 684, [1974] 2 All ER 261, CA. The ability of an English court to apply a rule of international law directly may be limited by an earlier decision of an English court which points the other way, and the court is bound to apply the earlier decision by the operation of the principle of stare decisis: see *Chung Chi Cheung v R*. As to the relationship between treaties and English law see PARA 17 et seq.

3 See *R v Jones* [2006] UKHL 16, [2007] 1 AC 136, [2006] 2 All ER 741 at [59] per Lord Hoffmann, [100] per Lord Mance, not committing themselves to the same rule in civil and criminal cases; *R (on the application of Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin) at [40] per Pill LJ ('The issue of the incorporation of customary international law into domestic law is not susceptible to a simple or general answer').

4 *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, [1977] 1 All ER 881, CA. The principle by which a court is bound to follow decisions in former cases applies to this rule but not to individual judgments determining the existence and content of any particular rule of customary international law, matters which are to be determined by reference to the processes of international law. See also *Playa Larga (Owners of Cargo Lately Laden on Board) v I Congreso del Partido (Owners)* [1983] 1 AC 244, sub nom *I Congreso del Partido* [1981] 2 All ER 1064, HL.

5 Foreign states seldom sue in the English court (though see *President of the State of Equatorial Guinea v Royal Bank of Scotland International (Logo Ltd intervening)* [2006] UKPC 7, [2006] 3 LRC 676; and *Mbasogo v Logo Ltd* [2006] EWCA Civ 1370, [2007] QB 846, [2007] 2 WLR 1062) and will often be protected by immunities if they are made defendants. Accordingly, it is immunities under customary law which are most often successfully invoked: see eg *Alcom Ltd v Republic of Colombia* [1984] AC 580, [1984] 2 All ER 6, HL.

6 *R v Jones* [2006] UKHL 16, [2007] 1 AC 136, [2006] 2 All ER 741.

7 *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), (2002) Times, 27 December, [2003] 3 LRC 335.

8 *R v Keyn (The Franconia)* (1876) 2 ExD 63, 2 BILC 701, CCR, where the court had no authority in English law to exercise a jurisdiction which customary international law permitted nor the power to assume that jurisdiction without Parliamentary intervention. In *R (on the application of Al-Saadoon) v Secretary of State for Defence* [2009] EWCA Civ 7, [2009] 3 WLR 957, [2009] All ER (D) 153 (Jan) at [59] per Laws LJ suggested that a rule of customary international law would have to be a peremptory norm binding on all states to provide a cause of action.

9 *R (on the application of Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin) at [60] per Cranston J.

10 It is important that the substance of the rule of customary law demonstrated by the evidence supports the precise claim which the applicant makes: *European Roma Rights Centre v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55, [2005] 2 AC 1, [2005] 1 All ER 527 at [26]-[28]; and *R (on the application of Al-Saadoon) v Secretary of State for Defence* [2009] EWCA Civ 7, [2009] 3 WLR 957, [2009] All ER (D) 153 (Jan) at [57]-[71] per Laws LJ.

11 *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, sub nom *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening) (No 3)* [1999] 2 All ER 97, HL.

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### (3) TREATIES AND ENGLISH LAW

#### 17. Ratification and other treaty processes.

The ratification of treaties is a matter for the executive under the prerogative<sup>1</sup>, subject to relevant statutory provisions<sup>2</sup>. This power of government extends to modifying and withdrawing from treaties; making reservations to treaties and modifying or withdrawing reservations; making, modifying or withdrawing optional declarations<sup>3</sup>; and deciding on the application of territorial clauses in treaties<sup>4</sup>. As a matter of practice, the government refers treaties which it intends to ratify to Parliament under a procedure known as the 'Ponsonby Rule'<sup>5</sup>. Some treaties are sent to the relevant Select Committee for possible pre-ratification scrutiny but the government does not acknowledge a duty to do this<sup>6</sup>. There is a need for consultation with the devolved authorities if the implementation of a treaty will require legislation within their areas of competence<sup>7</sup>.

1 *Blackburn v A-G* [1971] 2 All ER 1380, [1971] 1 WLR 1037 (no power of courts to review the decision to make, or not make, a treaty); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, HL. As to the exercise of the prerogative in relation to the making of treaties see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 801 et seq. As to the rules of international law governing the making of treaties see PARA 71 et seq.

2 Eg the European Parliamentary Elections Act 1978 s 6(1). See also *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552, [1994] 1 All ER 457, DC.

3 For the announcement by ministerial statement of the modification of the UK's Optional Clause declaration accepting the jurisdiction of the International Court of Justice, see (2004) 75 BYIL 804-805.

4 See eg the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969; ETS no 5) art 56; and *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529, [2006] 3 All ER 111.

5 See the Foreign and Commonwealth Office explanatory note on the Ponsonby Rule available at the date at this title states the law at [www.fco.gov.uk](http://www.fco.gov.uk); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 802.

6 'It is also government practice to send copies of treaties that raise significant human rights issues to the Joint Committee on Human Rights, together with a copy of the Explanatory Memorandum': see the Justice Minister's letter to First Minister of Scotland, 21 November 2008, available at the date at which this volume states the law at [www.justice.gov.uk](http://www.justice.gov.uk).

7 See the Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee, D1, D4 (December 2001) (Cm 5240), available at the date at which this title states the law at [www.justice.gov.uk](http://www.justice.gov.uk). The United Kingdom government is responsible for the conduct of the international relations of the UK but the implementation of international agreements may require action by a devolved authority (including legislation) and powers under international agreements may lie with devolved authorities.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/3. PUBLIC INTERNATIONAL LAW AND ENGLISH LAW/(3) TREATIES AND ENGLISH LAW/18. Implementation of treaties in domestic law.

## 18. Implementation of treaties in domestic law.

It is a general principle that treaties which are required to have effect in national law must be implemented by legislation<sup>1</sup>. The accepted approach is a 'minimalist' one, providing for the implementation only of those provisions of the treaty which need to be given effect in domestic law. Accordingly, in some cases, Parliament enacts legislation implementing only part of a treaty<sup>2</sup>. Where a series of treaties can be expected to be negotiated on the same topic authority to implement them by delegated legislation is sometimes provided under the primary act<sup>3</sup>.

Initially, it is the terms of the implementing statute with which a court will be confronted, and while it is generally said that there must be an ambiguity in the language of the statute before a court may look at the text of the treaty, this may mean no more than that the plain words of a statute will always take priority over a rule of international law. In any event, a court will usually have heard argument about the meaning of the treaty before it reaches a conclusion about the existence of an ambiguity in the statute<sup>4</sup>.

The practice with respect to implementing legislation is not uniform. Sometimes, the statute refers to the treaty directly, sometimes specific provisions of the treaty are scheduled to the statute, and sometimes the purport of the treaty may be incorporated in the substance of the statute in language suitable for the English legal context and no indication of the implementing purpose will appear on the face of the legislation. It is for any party who asserts that the statute is designed to implement a treaty provision to demonstrate that this is so<sup>5</sup>. The presumption that Parliament does not intend to legislate contrary to international law takes on a stronger effect here, and the presumption is that Parliament intends to legislate to give effect to the terms of the treaty, and must be interpreted accordingly unless plain words exclude that possibility<sup>6</sup>. The courts must also consider the meaning of the treaty from an international perspective, which requires them to take into account the Vienna Convention on the Law of Treaties, especially its provisions on interpretation<sup>7</sup>.

The case law remains unclear on whether the English courts should have regard only to those parts of the treaty directly or implicitly incorporated in the statute (interpreting the statute but taking into account the international origin of the implementing provisions) or if they should try to sit as though they were international court and consider the whole treaty and its context<sup>8</sup>. There are specific standards for the implementation of European Union law<sup>9</sup> and the European Convention on Human Rights<sup>10</sup>, but while there are strong obiter dicta about the role of the courts with respect to legislation which implements treaties, there is no general statutory injunction<sup>11</sup>.

1 If this were not so, the Crown, by entering into the treaty, would in effect be legislating without the consent of Parliament: *The Parlement Belge* (1879) 4 PD 129, 3 BILC 305. See also *Re Californian Fig Syrup Co's Trade Mark* (1888) 40 ChD 620 at 627, 6 BILC 460 obiter per Stirling J; *Walker v Baird* [1892] AC 491, 6 BILC 465, PC; *A-G for Canada v A-G for Ontario* [1937] AC 326 at 347-348, 6 BILC 330, PC; *Theophile v Solicitor-General* [1950] AC 186, [1950] 1 All ER 405, HL; *Republic of Italy v Hambros Bank Ltd and Gregory* [1950] Ch 314, [1950] 1 All ER 430, 6 BILC 525; *Blackburn v A-G* [1971] 2 All ER 1380 at 1382, [1971] 1 WLR 1037 at 1039, CA; *Pan American Airways Inc v Department of Trade* [1976] 1 Lloyd's Rep 257, CA; *Laker Airways Ltd v Department of Trade* [1977] QB 643, [1977] 2 All ER 182 CA; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523, HL; *Philipp Bros v Republic of Sierra Leone and Commission of the European Communities* [1995] 1 Lloyd's Rep 289, CA; *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, [2004] 4 All ER 1028 at [27] per Lord Hoffmann. With respect to claims against the Crown based upon the provisions of a treaty entered into by the

Crown see PARA 389. As to the interpretation of statutes founded upon treaties see PARA 95. For the suggestion that human rights treaties might be treated differently and effect given to an unimplemented human rights treaty, at least against the executive, see *Re McKerr* [2004] UKHL 12, [2004] NI 212, [2004] 2 All ER 409. There are, however, objections to this view: see Sales and Clement 'International Law in Domestic Courts: the Developing Framework' (2008) 124 LQR 398-400. Note that not all treaties require implementation by legislation: see eg the General Treaty for the Renunciation of War as an Instrument of National Policy, 1928 (Paris, 27 August 1928; TS 29 (1929); Cmd 3410); and the Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, 1 July 1968; TS 88 (1970); Cmd 4474) (see further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 802).

2 See eg the United Nations Act 1946 (and PARA 526); and the Human Rights Act 1998 (and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**).

3 See eg the Extradition Act 2003 ss 1(1), 69(1); and **EXTRADITION**. This means that any agreement reached with a foreign state must be compatible with the terms of the primary legislation.

4 See eg *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, sub nom *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523, HL.

5 *Salomon v Customs and Excise Comrs* [1967] 2 QB 116 at 144, [1966] 3 All ER 871 at 876, CA, per Diplock LJ: 'If from extrinsic evidence it is plain that the enactment was intended to fulfil Her Majesty's Government's obligations under a particular convention, it matters not that there is no express reference to the convention in the statute . . . The extrinsic evidence of the connection must be cogent.'

6 See **STATUTES** vol 44(1) (Reissue) PARA 1426.

7 Ie the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmd 7964) arts 31-33 (see PARA 95 et seq). The English courts have accepted they may have recourse to the Convention as a statement of customary international law, even though it has not been implemented into domestic law: *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 282, [1980] 2 All ER 696 at 706, HL per Lord Diplock; *European Roma Rights Centre v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55, [2005] 2 AC 1, [2005] 1 All ER 527 at [18] per Lord Bingham.

8 The courts have disavowed a wholly national approach to the interpretation of treaty provisions: *Black-Clawson International v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, [1975] 1 All ER 810; *Fothergill v Monarch Airlines* [1981] AC 251 at 290, [1980] 2 All ER 696 at 712 per Lord Scarman; *R v Home Secretary of State for the Home Department ex p Adan* [2001] 2 AC 477, [2001] 1 All ER 593, [2000] All ER (D) 2357. The treaty should be read as a whole: *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 279, [1980] 2 All ER 696 at 704, HL, per Lord Diplock; *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [2004] 3 All ER 785. The courts have accepted that the different processes by which legislation and treaties are produced makes reliance on domestic rules of statutory interpretation inappropriate to the interpretation of treaties: *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 at 305, [1998] 2 All ER 453 at 458 per Lord Lloyd. They have been particularly conscious of the purposive approach to interpretation contained in the Vienna Convention, and to the reliance which international courts place on the preparatory work of the treaty and different language versions of the text to resolve ambiguities: *European Roma Rights Centre v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55, [2005] 2 AC 1, [2005] 1 All ER 527 at [6]; *Belgium (Government of) v Postlethwaite* [1988] AC 924, [1987] 2 All ER 985 (the object of an extradition treaty to facilitate inter-state criminal cooperation); *Fothergill v Monarch Airlines* [1981] AC 251, at 282-283, [1980] 2 All ER 696 at 706-707, HL, per Lord Diplock. For extensive consideration of the preparatory work of the Refugee Convention, see *R v Asfaw* [2008] UKHL 31, [2008] 1 AC 1061, [2008] 3 All ER 775. For criticism that the English courts do not use preparatory work in the way an international judge would, see Gardiner *International Law* (1st Edn, 2003) pp 158-161. For a consideration of treaty texts in languages other than English, see *James Buchanan & Co v Babco Forwarding and Shipping UK Ltd* [1978] AC 141, [1977] 3 All ER 1048, HL; *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 2 All ER 696. The courts have from time to time taken a wide variety of evidence into account to determine the meaning of implementing language in a statute, including the work of the International Law Commission, decisions of international and national courts, resolutions of the General Assembly and the Handbook of the High Commissioner for Refugees. So long as these materials are used as evidence of the state of international law and not as sources of international law themselves, there can be no objections to this practice: see *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, [2008] 3 All ER 28 at [38] per Lord Bingham (subsequent practice of parties to European Convention on Human Rights); *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221, [2006] 1 All ER 575; *Entico Corp Ltd v United Nations Educational Scientific and Cultural Association* [2008] EWHC 531 (Comm), [2008] 2 All ER (Comm) 97.

9 See the European Communities Act 1972 ss 2, 3.

10 See the Human Rights Act 1998 s 3(1); and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 87.

11 See *The Eschersheim* [1981] AC 920 at 924 per Lord Diplock, stating that the language of an implementing statute should be given the meaning of the treaty, interpreted as an instrument of international law, which it implements if the statute is 'reasonably capable' of bearing that meaning.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/3. PUBLIC INTERNATIONAL LAW AND ENGLISH LAW/(3) TREATIES AND ENGLISH LAW/19. Unimplemented treaties.

### **19. Unimplemented treaties.**

Unimplemented treaties (and decisions taken under them) are acts in international law and have no direct consequences in English law. As a general rule it is not the business of the courts to interpret them, or to provide rights or recognise defences based upon them, which is to say that the courts have 'no jurisdiction' with regard to unimplemented treaties<sup>1</sup>. However, the courts may rely on unimplemented treaties, including interpreting them if necessary, to determine rights and duties under other rules of domestic law<sup>2</sup>. The rule of 'no jurisdiction' does not apply where the treaty is relevant to the exercise of a prerogative power which has law-creating effects (essentially, the power of the Crown to extend or reduce the jurisdiction of the state)<sup>3</sup>. Courts may also have regard to unimplemented treaties to determine the limits and contents of public policy<sup>4</sup>.

1 *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, [2002] 4 All ER 1028. Unimplemented treaties are sometimes said to be 'non-justiciable' (although the designation in the text above is to be preferred: PARA 24 note 1): *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, sub nom *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523, HL.

2 *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2006] QB 432, [2006] 2 All ER 225 (where the treaty in questions was one to which the UK was not even a party).

3 *Post Office v Estuary Radio* [1968] 2 QB 740, [1967] 3 All ER 663, CA.

4 See PARA 19.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/3. PUBLIC INTERNATIONAL LAW AND ENGLISH LAW/(4) ADMINISTRATIVE POWERS/20. In general.

## (4) ADMINISTRATIVE POWERS

### 20. In general.

The exercise of administrative powers under legislation which implements international obligations is subject to the ordinary disciplines of public law, including the obligation to interpret international law correctly where necessary<sup>1</sup>. An administrative decision-maker is not obliged to take into account, and nor is he bound by, the provisions of an unimplemented treaty<sup>2</sup>. It is likely that public law powers are constrained by at least some rules of customary international law<sup>3</sup>. Where the power in question is a prerogative power, the fact that there are international obligations which bear upon it does not alter the non-justiciability of any decision under it, which would be otherwise beyond judicial scrutiny in the absence of legislation<sup>4</sup>. Where a decision-maker legitimately takes into account a question of law, it is a reviewable matter whether or not his understanding of the law is correct. Although this principle has been extended to issues of international law, at least where the European Convention of Human Rights was concerned<sup>5</sup>, difficulties may arise if it were to be followed unqualifiedly. Advice on international law is routinely sought by ministers and generally acted upon. If every piece of advice on a matter of international law where an administrative action or power were being considered were subject to judicial review, considerable difficulties for the administration could be anticipated<sup>6</sup>. While considerations of justiciability might reduce the reach of review, many matters of international law, which the government might regard as being within its compass or as being subject to essential confidentiality could be subjected to public scrutiny and, on the existing authorities, a line is not easy to draw<sup>7</sup>.

1 Particular statutes may make consideration of international law mandatory: see eg the Diplomatic and Consular Premises Act 1987 ss 1(4), 2(2); and PARAS 270-271. See generally **ADMINISTRATIVE LAW**.

2 *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, [1991] 1 All ER 720, HL; *R (on the application of Hurst) v Northern District of London Coroner* [2007] UKHL 13, [2007] 2 AC 189, [2007] 2 All ER 1025 at [53]-[59] per Lord Brown; *R (on the application of Corner House Research) v Director of Serious Fraud Office (BAE Systems plc, interested party)* [2008] UKHL 60, [2009] 1 AC 756, [2008] 4 All ER 927, [2009] Crim LR 47 (no need to decide whether or not the decision-maker had correctly interpreted the international obligations of the United Kingdom because he had made it clear that his decision would have been the same whatever his conclusion had been because of overriding considerations of national security). As to unimplemented treaties see PARA 19.

3 See *European Roma Rights Centre v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening)* [2004] UKHL 55, [2005] 2 AC 1, [2005] 1 All ER 527 at [97]-[103] per Baroness Hale, although the proof of the rule here is rudimentary.

4 *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), (2002) Times, 27 December, [2003] 3 LRC 335. The domestic act of state doctrine would provide further grounds for excluding the courts: see PARA 22 et seq.

5 *R v Secretary of State for the Home Department, ex p Launder* [1997] 3 All ER 961, [1997] 1 WLR 839. In *R (on the application of Corner House Research) v Director of Serious Fraud Office (BAE Systems plc, interested party)* [2008] UKHL 60, [2009] 1 AC 756, [2008] 4 All ER 927, [2009] Crim LR 47 at [66] Lord Brown suggested that the established jurisprudence of the European Court of Human Rights could reinforce the decision of a domestic court to review a ministerial determination of what the European Convention on Human Rights required.

6 *R (on the application of Corner House Research) v Director of Serious Fraud Office (BAE Systems plc, interested party)* [2008] UKHL 60, [2009] 1 AC 756, [2008] 4 All ER 927, [2009] Crim LR 47 at [65]-[68] per Lord

Brown. See also Sales and Clement 'International Law in Domestic Courts: the Developing Framework' 124 LQR 404-407.

<sup>7</sup> *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), (2002) Times, 27 December, [2003] 3 LRC 335 at [15].

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/3. PUBLIC INTERNATIONAL LAW AND ENGLISH LAW/(4) ADMINISTRATIVE POWERS/21. Legitimate expectations.

## **21. Legitimate expectations.**

There is some scope for reliance on legitimate expectations in the field of foreign affairs but the mere fact that there is an international obligation on the United Kingdom does not give rise to a legitimate expectation that a power will be exercised in accordance with it. In particular, there is no room for arguing that the fact that the state has entered into a treaty which it has not implemented creates a legitimate expectation that public powers will be not be exercised incompatibly with the treaty obligations<sup>1</sup>. A legitimate expectation has been identified in the field of diplomatic protection<sup>2</sup>, but it has been suggested that it is unlikely that legitimate expectations having much practical impact could be generated in the field of foreign affairs, and that it might in any event be relatively easy for a government to disavow any which appeared inconvenient<sup>3</sup>.

<sup>1</sup> Cf *Minister of State for Immigration and Ethnic Affairs v Teoh (Human Rights and Equal Opportunity Commission intervening)* [1995] 3 LRC 1, 183 CLR 273, 128 ALR 353, HC Aus. The English authorities are inconsistent: *R v Secretary of State for the Home Department ex p Ahmed and Patel* [1998] INLR 546; and *R v Uxbridge Magistrates' Court, ex p Adimi* [2001] QB 667, [1999] 4 All ER 520, DC (both following *Minister of State for Immigration and Ethnic Affairs v Teoh*); *Behuli v Secretary of State for the Home Department* [1998] Imm AR 407 (finding no general legitimate expectation).

<sup>2</sup> See *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, (2002) Times, 8 November, [2003] 3 LRC 297.

<sup>3</sup> See Sales and Clement 'International Law in Domestic Courts: the Developing Framework' 124 LQR 410-412.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/3. PUBLIC INTERNATIONAL LAW AND ENGLISH LAW/(5) ACTS OF STATE/22. Introduction.

## (5) ACTS OF STATE

### 22. Introduction.

'Act of state' is not a term of art in English law and, as a description, it is used in more than one way. The 'domestic act of state' is a feature of constitutional law, and is a prerogative act of policy in the field of foreign affairs performed by the Crown<sup>1</sup> in the course of its relationship with another state or its subjects<sup>2</sup>. As an exercise of sovereign power, the courts have no jurisdiction to question the validity of an act of state<sup>3</sup>, although the municipal courts may be called upon and have power to decide whether an act is an act of state<sup>4</sup>. An act of state may be pleaded by way of defence by the Crown or its agent in a claim in tort brought by an alien in respect of an allegedly wrongful act committed against him outside the dominions of the Crown<sup>5</sup>.

The 'foreign act of state' is in general part of the conflict of laws<sup>6</sup> but, at least as to its exceptions, raises issues of international law<sup>7</sup>. Those questions overlap with matters of justiciability<sup>8</sup>.

1 An act of state need not be performed directly by the Sovereign, but may be performed by a subject who has the authority of the Crown: see **FOREIGN RELATIONS LAW** vol 18(2) (Reissue) PARA 617.

2 Eg making and performance of treaties, the annexation of foreign territory, the seizure of land or goods in right of conquest, declarations of war and of blockade, and the detention of an enemy alien in wartime or his deportation: see **FOREIGN RELATIONS LAW** vol 18(2) (Reissue) PARA 613. In general there can be no act of state with respect to a British subject: see **FOREIGN RELATIONS LAW** vol 18(2) (Reissue) PARA 618.

3 Nor can an individual rely upon an act of state in order to found a cause of action: see **FOREIGN RELATIONS LAW** vol 18(2) (Reissue) PARA 614. As a general rule, since the courts have no jurisdiction over acts of state, they will not enforce duties which the Crown has assumed by virtue of an act of state itself towards individuals, even though they are British subjects: see **FOREIGN RELATIONS LAW** vol 18(2) (Reissue) PARA 619.

4 See **FOREIGN RELATIONS LAW** vol 18(2) (Reissue) PARA 616.

5 See **FOREIGN RELATIONS LAW** vol 18(2) (Reissue) PARA 615.

6 See **CONFLICT OF LAWS**.

7 See PARA 23

8 See PARAS 24-25.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/3. PUBLIC INTERNATIONAL LAW AND ENGLISH LAW/(5) ACTS OF STATE/23. Acts of foreign states.

### 23. Acts of foreign states.

There are certain classes of act of a foreign sovereign or government<sup>1</sup> which the English courts will not allow to be questioned before them, in the sense that their validity may not be impugned by an action before those courts. These classes are not clearly defined<sup>2</sup>. The rule is not regarded as required by public international law but as an aspect of the conflict of laws and its application will depend upon the cause of action in which it arises.

Official acts done by a foreign sovereign or state or foreign government recognised as such by Her Majesty<sup>3</sup> or with which the British government has government-to-government dealings cannot be made the basis of responsibility of that sovereign, state or government if those acts are done in the country concerned, whether the act is right or wrong and whether it is according to the country's constitution or not<sup>4</sup>.

The English courts will not sit in judgment upon the acts of a sovereign effected by or by virtue of his sovereign capacity abroad<sup>5</sup>. Thus the English courts will not inquire into the validity of acts done by a recognised foreign government or a government with which the British government has government-to-government dealings against its own subjects in respect of property situate at the time of the acts in its own territory<sup>6</sup>. There is some authority for the view that if an act is done against a foreign national in respect of property within the territory of a foreign state in circumstances which amount to a breach of international law the English courts will not give effect to it<sup>7</sup>.

No proceedings may be brought in an English court against an individual in respect of any act done by him which was authorised by the sovereign or government of a foreign state within the territory of that state, even though the act may be criminal according to English law<sup>8</sup>. On the other hand, an English court will not entertain proceedings between private litigants which might involve inquiry into whether an act of a foreign state had taken place<sup>9</sup>.

1 'Act of State' is not a term of art in English law and, as a description, it is used in more than one way. The 'domestic act of state' is a feature of constitutional law: see PARA 22. The 'foreign act of State' is part of the conflict of laws but, at least as to its exceptions, raises issues of international law, which overlap with matters of justiciability: see PARA 24.

2 *Buttes Gas and Oil Co v Hammer* [1982] AC 888, sub nom *Buttes Gas and Oil Co v Hammer (No 2 and No 3)* [1981] 3 All ER 616, HL. See also *Dubai Bank Ltd v Galadari (No 5)* (1990) Times, 26 June; *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [1999] CLC 31.

3 As to recognition see PARA 41 et seq.

4 The English courts will not, as a matter of international comity or effectiveness, make a declaration impugning the validity of the laws or constitution of a foreign independent sovereign state, at any rate where that is the object of the action, and in any case ought not to do so: *Buck v A-G* [1965] Ch 745, [1964] 2 All ER 663; affd [1965] Ch 745, [1965] 1 All ER 882, CA. See also *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1 at 17, 21, 22, 3 BILC 138 per Lord Cottenham LC, and at 27 per Lord Campbell; cf *Munden v Duke of Brunswick* (1847) 10 QB 656, 3 BILC 148. In so far as an action is begun against a foreign sovereign it will in any event fail as being beyond the jurisdiction of the courts by reason of the defendant's sovereign immunity: see PARA 243.

5 This rule was explained, upon the basis of the rule that an English court will not sit in judgment upon an act of a foreign state or government, in *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532 at 548, 2 BILC 97, CA, per Warrington LJ. However, in the same case at 544-545, Bankes LJ did not rely upon this and it is probable that the rule as stated in the text is merely an aspect or application of the rule that the lex situs of property governs questions of title to it: see now *Williams and Humbert Ltd v WH Trademarks*

(*Jersey Ltd* [1986] AC 368, [1986] 1 All ER 129, HL; *Settebello Ltd v Banco Totta Acores* [1985] 2 All ER 1025, [1985] 1 WLR 1050, CA. If this is so, the rule is not a rule of public international law but a rule of private international law. It seems clear that the English courts will not give effect to decrees of a foreign state affecting property outside its territory and certainly not when such decrees are confiscatory and discriminatory: see eg *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140; *A-G of New Zealand v Ortiz* [1984] AC 1, [1983] 2 All ER 93, HL. See also *Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWCA Civ 1374, [2009] QB 22, [2008] 1 All ER 1177. As to governmental acts affecting property see generally **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 422 et seq.

6 *Anglo-Iranian Oil Co Ltd v Jaffrate, The Rose Mary* [1953] 1 WLR 246, Aden SC. However, in *Re Helbert Wagg & Co Ltd* [1956] Ch 323, [1956] 1 All ER 129, 7 BILC 251, Upjohn J preferred to explain this decision on the ground that the Iranian decree in question was contrary to English public policy (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 358) as being discriminatory. In *Oppenheimer v Cattermole* [1976] AC 249, [1975] 1 All ER 538, HL (distinguished in *Kuwait Airways Corp v Iraqi Airways Co* [1999] CLC 31), Lord Cross of Chelsea (at 278 and 567) and Lord Salmon (at 281 and 572) were of the opinion (obiter) that legislation enacted by a foreign state which takes away without compensation from a section of its citizen body singled out on racial grounds all their property, and in addition deprives them of their citizenship, is contrary to international law and constitutes so grave an infringement of their human rights that the English courts ought to refuse to recognise it as law at all. It is uncertain whether such an act would be contrary to international law. In *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883, [2002] 3 All ER 209 the court found that there was a clear breach of a fundamental principle of international law, an otherwise applicable foreign law was not recognised in England, under a developing head of public policy.

7 *Blad's Case* (1673) 3 Swan 603, PC; *Blad v Bamfield* (1674) 3 Swan 604. If the act was committed within the territory of the foreign state and its authorisation makes it lawful there, then, even if it would have been actionable as a tort if committed in England, the act would not be actionable as such in the English courts by virtue of the rules of English private international law governing liability for torts committed abroad. This appears to be the explanation of *Carr v Fracis, Times & Co* [1902] AC 176, 2 BILC 823, HL; and *Dobree v Napier* (1836) 2 Bing NC 781 may be explained on similar grounds. As to liability in tort for acts done abroad see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 366 et seq.

8 *R v Lesley* (1860) Bell CC 220, 3 BILC 586, CCR, where the conviction of the captain of a British ship for false imprisonment in taking on board and keeping there individuals, under the authority of a foreign government, could not be supported in so far as the acts were done in the waters of the foreign state. However, liability can be imposed for such acts done outside the foreign waters, as for example on a British ship on the high seas: *R v Lesley*. It seems, therefore, very doubtful whether the rule as stated in the text applies to acts committed within British territory by order of a foreign sovereign or government. There is no direct English authority on the point, but see 1 Hale PC 99. In *The People v McLeod* 1 Hill 377 (USA 1841), the Supreme Court of New York held that the plea of act of state afforded no defence to a British subject who had committed a criminal offence authorised by his own government in the territory of New York State. The governments of this country and of the United States agreed in diplomatic exchanges that the decision was incorrect (39 BFSP 1127, 1131, 1141), but other authorities, including Lord Lyndhurst, agreed with it: see Harrison Moore's Act of State in English Law 122-131. As to state immunity in respect of acts committed by a former foreign head of state see also *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, sub nom *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening)* (No 3) [1999] 2 All ER 97, HL; PARAS 263, 285; and **EXTRADITION**.

9 *Buttes Gas and Oil Co v Hammer* [1982] AC 888, sub nom *Buttes Gas and Oil Co v Hammer (No 2 and No 3)* [1981] 3 All ER 616, HL. As to justiciability see PARA 24.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/3. PUBLIC INTERNATIONAL LAW AND ENGLISH LAW/(6) JUSTICIABILITY/24. Justiciability of acts of the United Kingdom government.

## (6) JUSTICIABILITY

### 24. Justiciability of acts of the United Kingdom government.

The terms 'justiciability' and 'non-justiciability' as they apply to acts of the United Kingdom government have not always been used consistently in the case law, and it would sometimes be better to see an issue characterised as justiciability as one of jurisdiction<sup>1</sup>. Confusion arises because the non-statutory powers of government in the area of foreign affairs are found in the prerogative, and as such their exercise is, in general, beyond the jurisdiction of the courts<sup>2</sup>. The legal character of such powers is sometimes also a feature of their substantive character: they are political matters about which there are no legal standards to apply<sup>3</sup>. Where, following the GCHQ case<sup>4</sup>, prerogative powers are within the jurisdiction of the courts and there are therefore judicial standards to assess their exercise, their justiciability may be considered with respect to some foreign affairs powers<sup>5</sup>. So not every decision taken under a particular power is within the jurisdiction of the courts and it is a matter of justiciability to decide if the court might adjudicate on a contested decision. Some powers remain quite outside the jurisdiction of the courts<sup>6</sup>, and to the extent that the justification given for this is that there are no judicial standards to apply, it has been argued that international law can supply them<sup>7</sup>. The courts have shown no disposition to accede to this argument<sup>8</sup>.

1 It is unhelpful to refer to unimplemented treaties of the UK as being 'non-justiciable' in the English court (see PARA 19), rather it is an absence of jurisdiction which precludes a court from determining an issue of international law which operates only on the international plane: *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, [2004] 4 All ER 1028 at [27] per Lord Hoffmann; *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), (2002) Times, 27 December, [2003] 3 LRC 335 at [47].

2 As to the royal prerogative and its exercise see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 367 et seq; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 64.

3 The powers to deploy the troops overseas, or to make treaties, for instance, are wholly a matter of political choice and are 'non-justiciable': *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 418, [1984] 3 All ER 935 at 956, HL, per Lord Roskill.

4 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935.

5 *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, (2002) Times, 8 November, [2003] 3 LRC 297, where, in the context of diplomatic protection, it was found that there was a minimal duty of consideration of the situation of a British national, but that 'on no view' would it have been appropriate to order the Foreign Secretary to intervene with the United States.

6 See note 3.

7 *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), (2002) Times, 27 December, [2003] 3 LRC 335 at [47] per Brown LJ.

8 *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), (2002) Times, 27 December, [2003] 3 LRC 335; *R v Jones* [2006] UKHL 16, [2007] 1 AC 136, [2006] 2 All ER 741 at [30] per Lord Bingham, and at [65]-[66] per Lord Hoffmann; *R (on the application of Gentle) v The Prime Minister* [2008] UKHL 20, [2008] 1 AC 1356, [2008] 3 All ER 1.



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## 25. Justiciability of acts of foreign states.

Even if the courts were persuaded to apply international law to matters of high policy<sup>1</sup>, there is another form of non-justiciability which would inhibit the exercise of jurisdiction in such cases, and applies as much to acts of foreign states as they do to those of the British government. It has been said that there is doctrine of judicial restraint which requires that the courts do not adjudicate on matters of international law arising in disputes involving foreign states<sup>2</sup>. Later judgments have emphasised that the principle is flexible and is a doctrine of discretionary non-justiciability, rather than jurisdiction<sup>3</sup>. The application of rules of international law to a dispute involving foreign states may be difficult for an English court where the international law is contested between the states, hence the absence of judicial or manageable standards for adjudication<sup>4</sup>. The determination of a dispute may be unacceptable to the states involved, particularly if they would have been entitled to immunity if they had been parties to the action<sup>5</sup>. The availability of alternative avenues to settle the dispute is a factor which weighs against the case being heard by an English court<sup>6</sup>.

1 Eg the deployment of troops overseas or to make treaties: see PARA 24.

2 *Buttes Gas and Oil Co v Hammer* [1982] AC 888 at 931-932, sub nom *Buttes Gas and Oil Co v Hammer (No 2 and No 3)* [1981] 3 All ER 616 at 628, HL, per Lord Wilberforce (an action between private parties, so that state immunity could not be raised, but that involved a maritime boundary dispute between two foreign states).

3 *R v Bow Street Magistrate, ex p Pinochet Ugarte* [2000] 1 AC 61 at 104, [1998] 4 All ER 897 at 935, HL; *Kuwait Airways Corpn v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883, [2002] 3 All ER 209 at [26].

4 *Kuwait Airways Corpn v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883, [2002] 3 All ER 209; *R (on the application of Al-Haq) v the Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin). The matter is not one of an inherent limitation on the courts as they will take on questions of international law, even where they are contested, if it is necessary to resolve a matter within their jurisdiction in English law: *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2006] QB 432, [2006] 2 All ER 225.

5 *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), (2002) Times, 27 December, [2003] 3 LRC 335 at [37].

6 *R (on the application of Corner House Research) v Director of Serious Fraud Office (BAE Systems plc, interested party)* [2008] UKHL 60, [2009] 1 AC 756, [2008] 4 All ER 927, [2009] Crim LR 47 at [45].

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## 4. THE CONDUCT OF INTERNATIONAL RELATIONS

### 26. The Crown.

By English law, for external purposes, the Crown represents the community. No person or body save the Queen, by her accredited representatives, can deal with a foreign state so as to acquire rights or incur liabilities on behalf of the community at large<sup>1</sup>. Conforming almost exactly to the classical conception in international law of the head of state<sup>2</sup>, invested with the *jus omnimodae repraesentationis*, the Crown declares war and makes peace<sup>3</sup>, makes treaties<sup>4</sup>, acquires and cedes territory<sup>5</sup>, accords recognition to foreign states and governments<sup>6</sup>, appoints as minister for foreign affairs the Secretary of State for Foreign and Commonwealth Affairs<sup>7</sup>, sends and receives ambassadors<sup>8</sup>, appoints British consular officers and grants exequaturs to foreign consular officers<sup>9</sup>. It is not possible to give an exhaustive list of the functions of the Crown in international relations, as such a list must include all functions of possible international legal relevance, a category which presumably is never closed.

The constitution, while confiding a monopoly of the control and conduct of international relations to the Crown, requires that the Crown's function in this regard, as in all others, is to be exercised only on the advice of the responsible minister or ministers<sup>10</sup> and, in matters to do with the treaty-making power, the war power and the annexation or cession of territory, in concert with Parliament<sup>11</sup>.

Whereas, in general, acts of the Crown are required to be done in strict compliance with certain forms from which there is no power to deviate, the principle does not obtain with full force in relation to acts in the sphere of international relations. Thus war may be initiated by proclamation, by an Order in Council for general reprisals, or informally without any declaration<sup>12</sup>. No special formality, either, is requisite to the annexation of territory<sup>13</sup>.

In terms of domestic law an act of the Crown in relation to foreign affairs is an act of state, and is not within the courts' power of review<sup>14</sup>. It is a necessary corollary of the Crown's exclusive power in international relations and of the binding quality of an act of state that the declaration by the Crown as to what it has done or not done within its sphere should be accepted by the courts as conclusive. Such declaration usually takes the form of a certificate on behalf of the Secretary of State for Foreign and Commonwealth Affairs or other minister of the Crown concerned<sup>15</sup>, but may also be made orally in open court<sup>16</sup>.

1 See 2 Anson's Law and Custom of the Constitution (4th Edn) Pt II, 131. As to the illegality of unauthorised dealings with foreign states see *R v Earl of Danby* (1685) 2 Show 335.

2 As to the position, in international law generally and from the point of view of English law, of a foreign head of state see PARA 263 et seq.

3 As to the war power see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 809 et seq; **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 406 et seq.

4 See PARA 71 et seq.

5 See PARA 115 et seq.

6 See PARA 41 et seq.

7 As to the Secretary of State for Foreign and Commonwealth Affairs see PARA 29; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 459 et seq.

8 See PARA 31.

9 See PARA 30.

10 See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 801.

11 See PARAS 71 et seq, 115 et seq, and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 801 et seq.

12 See *The Ionian Ships* (1855) 2 Ecc & Ad 212, 1 BILC 635; 6 British Digest 106-108. See also **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 406 et seq.

13 *Re Southern Rhodesia* [1919] AC 211 at 239, 1 BILC 644, PC. As to the principal forms employed in the exercise of the Crown's powers in international relations, ie Order in Council, proclamation, letters patent, other documents (eg instruments of ratification) under the Great Seal and documents under the sign manual, and as to choice of form, see 7 British Digest 19-25. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 906 et seq.

14 *Salaman v Secretary of State for India* [1906] 1 KB 613, 1 BILC 594, CA. As to acts of state see PARA 22 et seq.

15 Certification is a fact of state: see PARA 15; and **CIVIL PROCEDURE**.

16 See the statement as to the limits of territorial waters claimed by the Crown made by the Attorney General in *The Fagernes* [1927] P 311 at 319, 2 BILC 914, CA.

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## 27. Parliament.

In principle, the Crown may exercise the prerogative power to send armed forces into conflict abroad without any Parliamentary discussion or debate, or without Parliamentary consent<sup>1</sup>. In practice, Parliament has very frequently been consulted, or its approbation sought, in cases in which the United Kingdom has become actually involved in war or has resorted to action provocative of war<sup>2</sup>.

Equally in practice the treaty-making power of the Crown has to a degree been shared with Parliament, whose co-operation is naturally necessary for the implementation of any treaty calling either for an appropriation of public money or a change in domestic law<sup>3</sup>. The approbation or approval of Parliament is thus sometimes stipulated for in treaties<sup>4</sup>, just as their entry into operation may be made dependent on the procuring of legislation<sup>5</sup>. The thesis that the Crown may not fetter its discretion as a member of the legislature by entering, without the concurrence of its partners in the legislative process (the two Houses of Parliament), into any international engagement whatsoever with respect to any matter capable of being legislated upon, although it has been advanced, is not acceptable<sup>6</sup>. Nor is a narrower rule that the Crown may not contract internationally in relation to any matter with respect to which Parliament has already legislated necessarily any more acceptable<sup>7</sup>. In any event the power of the Crown to conclude treaties of peace independently of Parliament has always been conceded<sup>8</sup>.

1 See PARA 26; and cf 2 Anson's Law and Custom of the Constitution (4th Edn) Pt II, 136-137. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 809 et seq; **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 406 et seq. See also the MoJ, MoD and FCO Consultation Paper *The Governance of Britain: War powers and treaties: Limiting Executive powers* (CP26/07), para 35.

2 See the MoJ, MoD and FCO Consultation Paper *The Governance of Britain: War powers and treaties: Limiting Executive powers* (CP26/07), para 35.

3 See the MoJ, MoD and FCO Consultation Paper *The Governance of Britain: War powers and treaties: Limiting Executive powers* (CP26/07), Pt 2.

4 See eg the Treaty of Commerce and Navigation with Portugal (Lisbon, 12 August 1914; TS 6 (1916); Cd 8402), in which additional art 17 stipulated that the treaty would not come into force until the sanction of the British Parliament for art 6 (relating to the imposition of criminal penalties upon the importation and sale as 'Port' or 'Madeira' of wine not produced in Portugal or Madeira) had been obtained.

5 See eg Convention with Prussia for the Mutual Surrender of Criminals (London, 5 March 1864; 54 BFSP 16), which failed to come into operation for lack of statutory approval and was terminated by Protocol (London, 14 May 1872; 62 BFSP 15; C 564).

6 However, no treaty which provides for any increase in the powers of the European Parliament may be ratified by the United Kingdom unless it has been approved by an Act of Parliament: European Parliamentary Elections Act 2002 s 12(1). For this purpose, 'treaty' includes any international agreement, and any protocol or annex to a treaty or international agreement: European Parliamentary Elections Act 2002 s 12(2).

7 See 7 British Digest 52.

8 See generally 7 British Digest 39 et seq. As to whether the Crown's power to conclude treaties of peace comprehends power to implement their stipulations domestically see *Walker v Baird* [1892] AC 491, 6 BILC 465, PC.

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## 28. Treaties of cession.

The suggestion that a treaty for the cession of territory requires the approbation of Parliament may have more substance. The question in fact is one which goes beyond the scope of the treaty-making power and involves a consideration of the Crown's power to cede territory whether by treaty or other means. The limitation, if it exists, applies only in time of peace, the power of the Crown alone to terminate a war upon any terms whatsoever, by treaty or otherwise, not being touched upon by the doctrine involved. That doctrine has been the subject of parliamentary discussion and official examination on several occasions, the last being, apparently, that of the cession of Heligoland to Germany in 1890, when statutory indorsement was obtained<sup>1</sup>. This precedent has been followed ever since<sup>2</sup>, so that the doctrine would appear to be established<sup>3</sup>. With a short interval, it has been the practice for the executive government since 1924 to lay treaties which are subject to ratification before Parliament before their final conclusion to secure publicity and afford opportunity for discussion<sup>4</sup>. For more than a century it has been usual to present treaties to Parliament after conclusion; and the texts so presented are, since 1892, published in the Treaty Series<sup>5</sup>.

1 See the Anglo-German Agreement Act 1890 s 1; and see *Damodhar Gordhan v Deoram Kanji* (1876) 1 App Cas 332, 2 BILC 604, PC; Forsyth's Cases and Opinions on Constitutional Law 185; and the survey of practice in 7 British Digest 53-82.

2 See the Anglo-French Convention Act 1904 s 1; the Anglo-Italian Treaty (East African Territories) Act 1925; the Straits Settlements and Johore Territorial Waters (Agreement) Act 1928; the Dindings Agreement (Approval) Act 1934; and the Anglo-Venezuelan Treaty (Island of Patos) Act 1942 s 1.

3 The creation of a new dominion or state, whether or not within the Commonwealth, upon territory subject to the sovereignty of the Crown exercised through the government of the United Kingdom, and equally the transfer of additional territory to any such dominion or state, has similarly been effected by statute. See the Irish Free State (Agreement) Act 1922; the Indian Independence Act 1947; the Burma Independence Act 1947; the Ireland Act 1949; the numerous later independence Acts; the Cocos Islands Act 1955; and the Christmas Island Act 1958.

4 As to this, the so-called 'Ponsonby rule', see the MoJ, MoD and FCO Consultation Paper *The Governance of Britain: War powers and treaties: Limiting Executive powers* (CP26/07), para 120 et seq.

5 Treaties and conventions are cited in this title with references to the place where and date when they were entered into, and to the appropriate Treaty Series and Command Papers, eg the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219), was done at Vienna on 24 April 1963, and the text is to be found in Treaty Series No 14 of 1973 and in Command Paper No 5219. Upon being presented to Parliament a text may be published in the Miscellaneous Series (cited as eg Misc 19 (1975)).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/4. THE CONDUCT OF INTERNATIONAL RELATIONS/29. The Secretary of State and other persons who may represent the state.

## **29. The Secretary of State and other persons who may represent the state.**

In any English enactment, 'Secretary of State' means one of Her Majesty's principal secretaries of state<sup>1</sup>. The minister of the United Kingdom concerned with international relations is generally the Secretary of State for Foreign and Commonwealth Affairs<sup>2</sup>. Under international law other persons may represent the state in specific fields<sup>3</sup>.

1 See the Interpretation Act 1978 s 5, Sch 1. As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

2 As to the Secretary of State for Foreign and Commonwealth Affairs see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 459-460. Other ministers, such as the Secretary of State for the Home Department, may also have some related responsibilities. As to the function in relation to the conduct of international relations of organs of the central government other than the department of the Secretary of State for Foreign and Commonwealth Affairs see 7 British Digest 219-281. As to the Secretary of State for the Home Department see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 466 et seq.

As to the position of the foreign minister of a state in international law generally see the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002, 3 at 20-25 (paras 51-61); and Watts 'The Legal Position in International Law of Heads of State, Heads of Governments and Foreign Ministers' *Hague Academy of International Law, Recueil des Cours* vol 247 (1994-III).

3 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility)* ICJ Reports 2006, 6 (paras 45-48).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/4. THE CONDUCT OF INTERNATIONAL RELATIONS/30. Consular officers.

### 30. Consular officers.

Consular officers are generally members of the Diplomatic Service; there are also non-career or 'honorary' consular officers<sup>1</sup>. Some of a consular officer's duties are derived from statute; others are non-statutory<sup>2</sup>. His statutory duties include the administration of oaths and the performance of any notarial act which a notary public can do within the United Kingdom<sup>3</sup>. He has functions in connection with shipping, seamen and kindred matters<sup>4</sup>; offences on board British aircraft<sup>5</sup>; passports, visas and similar documents<sup>6</sup>; marriages and civil partnerships abroad<sup>7</sup>; births and deaths abroad<sup>8</sup>; and the registration of children and young persons employed abroad<sup>9</sup>.

A consular officer may advise and assist British nationals trading in, residing in and visiting his district; this may include the relief and repatriation of distressed British nationals. The fees which may be charged by a consular officer are regulated by Order in Council<sup>10</sup>. The appointment of a consular officer may be given definitive recognition by the foreign government concerned by the issue of an exequatur or other authorisation.

1 In statutes, 'consular officer' means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions; 'consular post' means any consulate-general, consulate, vice-consulate or consular agency; and 'head of consular post' means the person charged with the duty of acting in that capacity: Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219) art 1(1) (set out in the Consular Relations Act 1968 s 1, Sch 1); Interpretation Act 1978 s 5, Sch 1. Pro-consuls are not consular officers and are given that title to enable them to perform notarial functions. As to consular functions see the Vienna Convention on Consular Relations art 5: see **PARA 290** et seq. As to diplomatic and consular officers acting as notaries see **LEGAL PROFESSIONS** vol 66 (2009) **PARA 1417**.

2 See **PARA 292**.

3 See the Commissioners for Oaths Act 1889 s 6(1) (amended by the Commissioners for Oaths Act 1891 s 2). Every British ambassador, envoy, minister, chargé d'affaires and secretary of an embassy or legation in a foreign country also has these powers. See further **CIVIL PROCEDURE**. In English statutes, 'United Kingdom' means Great Britain and Northern Ireland (Interpretation Act 1978 s 5, Sch 1); and 'Great Britain' means England, Scotland and Wales (Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a)). Neither the Isle of Man nor the Channel Islands are within the United Kingdom. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4 See eg his powers for enforcement in relation to United Kingdom ships under the Merchant Shipping Act 1995 s 257 (see **SHIPPING AND MARITIME LAW** vol 93 (2008) **PARA 47**).

5 See eg his functions under the Civil Aviation Act 1982 s 95 in relation to offences on aircraft; and **AIR LAW** vol 2 (2008) **PARA 618**.

6 As to passports see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) **PARA 78**.

7 See the Foreign Marriage Act 1892; the Foreign Marriage Act 1947; and **CONFLICT OF LAWS** vol 8(3) (Reissue) **PARA 214** et seq. As to the registration of civil partnerships abroad in the presence of a prescribed officer of the Diplomatic Service see the Civil Partnerships Act 2004 s 210, the Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) **PARAS 145-146**.

8 See the Registration of Overseas Births and Deaths Regulations 1982, SI 1982/1123; the Registration (Entries of Overseas Births and Deaths) Order 1982, SI 1982/1526; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) **PARA 578** et seq.

9 See the Children and Young Persons Act 1933 ss 25, 26 (both as amended); and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) **PARA 776** et seq.

10 See the Consular Fees Act 1980 s 1 (amended by the Identity Cards Act 2006 s 36); the Consular Fees Regulations 1981, SI 1981/476 (amended by SI 2000/1017); the Consular Fees Order 2009, SI 2009/700 (amended by SI 2009/1745). See also the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 42(3)-(8) (and **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 6); the Consular Fees Act 1980 (Fees) Order 2000, SI 2000/3353; the Consular Fees Act 1980 (Fees) Order 2002, SI 2002/1618; the Consular Fees Act 1980 (Fees) Order 2005, SI 2005/2112; and the Consular Fees Act 1980 (Fees) (No 2) Order 2005, SI 2005/3198.



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### **31. Ambassadors and other diplomatic agents.**

British ambassadors<sup>1</sup> and other diplomatic agents<sup>2</sup> accredited by the Crown in the United Kingdom<sup>3</sup> to other states are a means by which the political relations of the United Kingdom with those states are carried on<sup>4</sup>. In addition to the general duty of diplomatic agents to represent the United Kingdom politically, they are entrusted with certain powers and functions by statute<sup>5</sup>.

1 An ambassador is the head of the mission; in certain cases a diplomatic agent of a lower rank, such as a minister, is the head of mission. As to the meaning of 'head of mission' see the Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmd 2565) art 1(a). As to the classes of heads of mission see art 14 para 1; and PARA 267.

2 As to the meaning of 'members of the diplomatic staff' see the Vienna Convention on Diplomatic Relations art 1(d); and PARA 269 note 2. As to the meaning of 'diplomatic agent' see art 1(e); and PARA 273 note 1.

3 For the forms of letters of credence, or credentials, used in the United Kingdom see Satow's Diplomatic Practice (6th Edn, 2009) pp 61-62. It is the letter of credence which establishes the right to act in a diplomatic capacity. Generally, the head of mission is considered to have taken up his function in the receiving state when he has presented his credentials to the head of that state: Vienna Convention on Diplomatic Relations art 13 para 1.

4 As to the functions of a diplomatic mission see the Vienna Convention on Diplomatic Relations art 3 para 1; and PARA 266.

5 For the powers in respect of the administration of oaths and notarial acts see the Commissioners for Oaths Act 1889 s 6(1) which is extended with respect to United Kingdom diplomatic representatives in Commonwealth countries by the Consular Relations Act 1968 s 10(3): see further see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1417; and **CIVIL PROCEDURE**. As to the performance of marriages in United Kingdom embassies under the Foreign Marriage Acts 1892 to 1947 see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 214 et seq. As to the registration of civil partnerships abroad in the presence of a prescribed officer of the Diplomatic Service, see the Civil Partnerships Act 2004 s 210, the Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARAS 145-146.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/5. SUBJECTS OF INTERNATIONAL LAW/(1) INTERNATIONAL LEGAL PERSONALITY/32. International personality: states.

## **5. SUBJECTS OF INTERNATIONAL LAW**

### **(1) INTERNATIONAL LEGAL PERSONALITY**

#### **32. International personality: states.**

The notion of 'international personality' denotes only that an entity with personality has some rights and duties in international law. The principal category of personality in international law is that of statehood<sup>1</sup>. As a foundational element of the international legal system, statehood originally was a matter of fact but is now well-established to be a matter of law both as to the criteria of statehood and the consequences of being a state<sup>2</sup>. It is also the case that there are a number of circumstances in which the law precludes the acquisition of statehood to entities, otherwise qualified, which have been created by means unlawful in international law or which assert a system of government illegal in international law<sup>3</sup>. States are territorial entities, the governments of which exercise effective control of the population of the territory and which are legally capable of entering into legal relations with other states, that is to say, are independent of any other state<sup>4</sup>. Such states enjoy the status of sovereign equality within the international legal system and are entitled to have their internal independence respected by other states<sup>5</sup>. States are bound by customary international law (in the creation and modification of which they have an equal right to participate) and they may enter into treaty relations with other states and other international persons with treaty-making capacity which create binding obligations for the parties<sup>6</sup>.

1 See James Crawford *The Creation of States in International Law* (2nd ed 2006) Ch 2.

2 See James Crawford *The Creation of States in International Law* (2nd ed 2006) pp 40-43.

3 See James Crawford *The Creation of States in International Law* (2nd ed 2006) pp 157-175.

4 See the Pan-American Convention on the Rights and Duties of States (the 'Montevideo Convention') (Montevideo, 26 December 1933; 165 LoNTS 19; 28 AJIL (Supp) 75) art 1.

5 See the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, principle 1, General Assembly Resolution 2625 (XXV) of 24 October 1970.

6 See PARA 56 et seq.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/5. SUBJECTS OF INTERNATIONAL LAW/(1) INTERNATIONAL LEGAL PERSONALITY/33. Statehood and recognition.

### 33. Statehood and recognition.

The statehood of the earliest states which created the international system was a matter of fact, which those involved accepted of each other<sup>1</sup>. The acquisition of statehood subsequently was sometimes equally a matter of tacit acceptance, where the new states came into existence by a process of peaceful constitutional evolution<sup>2</sup>. However, more generally, and particularly where there was some dispute about the emergence of a new state, as might be the case where there was a forcible secession of part of an established state for example, the status of any entity claiming to be a state might be recognised by other states. Although there is great doctrinal difference about the nature of the recognition decision, the preferred view is that recognition is declaratory of the status of the new state, which must possess the criteria of statehood to be lawfully recognised<sup>3</sup>. In the absence of some specific mechanism for determining statehood in a particular case<sup>4</sup>, it is for each state to determine whether or not an entity claiming to be a state satisfies the criteria of statehood. Recognition, then, is not a criterion of statehood but the exercise of an individual discretionary power by a state, indicating that it accepts that the recognised entity satisfies the conditions for statehood and that it intends to deal with the new state according to the rules of international law. If its assessment of the satisfaction of any of the criteria of statehood is without foundation, any dealings with that entity as a state will violate the rights of the existing sovereign<sup>5</sup>. States are not obliged to recognise entities which they regard as being states, nor must they have or maintain diplomatic relations with their governments<sup>6</sup>. Recognition, then, may bind the state in the manner of an estoppel and it is not free to withdraw its recognition unless there is a change in the circumstances which formed the basis for the act of recognition.

The United Kingdom recognises states which satisfy the criteria of statehood. In United Kingdom law, the courts will take judicial notice of the status of established states, but in contested cases statehood is to be proved by evidence<sup>7</sup>. The decisions to recognise states and to establish diplomatic relations and to have other dealings with their governments fall within the foreign affairs prerogative of the Crown<sup>8</sup>. In some cases involving the construction of contracts or other documents of private law, the courts will decide for themselves whether an entity is a 'state' or 'country' for the purposes of the document but these decisions have no implications for the international legal status of the body concerned<sup>9</sup>.

1 Cf the doctrine of acquisition of territory by historic title as applied in the *Minquiers and Ecrehos Case (France/United Kingdom)* ICJ Reports 1953, 47. See PARA 118.

2 This is the case notably with states of the Commonwealth which have acquired independence of the UK since the Statute of Westminster 1931: see **COMMONWEALTH**.

3 See PARA 41.

4 Examples of specific mechanisms are the admission to membership of an international organisation, when a decision about whether an entity is a state will be taken by the organs of the organisation (see eg Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 4 para 1; and PARA 520) or where the matter falls for determination by an international tribunal (see eg Application 25781/94: *Cyprus v Turkey* (2001) 35 EHRR 731, ECtHR (the status of the 'Turkish Republic of Northern Cyprus')).

5 In these circumstances, recognition is described as 'premature' or 'precipitate': see eg the recognition of Bangladesh by India in December 1971, when the territory of East Pakistan was still under the control of the government of Pakistan. The existing state is protected by the principle of territorial integrity: see the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, principle 6, General Assembly Resolution 2625 (XXV) of 24

October 1970. More recently, Serbia has complained that states which have recognised Kosovo have done so in violation of Serbia's rights: see 476 HC Official Reports (6th series), 22 May 2008, col 518W.

6 However, it appears that the Democratic People's Republic of Korea was a state from 1953, although it was not recognised by the UK until it was admitted to the UN in 1991. For the dates at which the various successor state to the Socialist Federal Republic of Yugoslavia became states see the Arbitration Commission of the European Conference on Yugoslavia (the 'Badinter Commission'), opinion 8 (1992) 92 ILR 188.

7 Now the presentation of an Executive Certificate from the Foreign Secretary establishes conclusively whether or not HMG recognises the entity as a state: see *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 1 KB 456, 2 BILC 85; revsd after recognition [1921] 3 KB 532, [1921] All ER Rep 138, 2 BILC 97, CA. See also *Caglar v Billingham (Inspector of Taxes)* [1996] STC (SCD) 150.

8 See **FOREIGN RELATIONS LAW** vol 18(2) (Reissue) PARA 606.

9 See PARA 49.

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### **34. Factors precluding statehood as a matter of international law.**

In some cases, international law precludes an entity which appears to possess the characteristics of statehood from becoming a state<sup>1</sup>. These instances fall into two overlapping categories: either the criteria of statehood have been established in a way which breaches a fundamental rule of international law<sup>2</sup>, or the creation of a new state would be a breach of a fundamental rule of international law<sup>3</sup>. The reason for the disability may be that the rule is a peremptory norm or that the consequence that statehood may not be achieved is part of customary international law<sup>4</sup>. It follows that states may not recognise any such entity as a state. In many cases this obligation results most clearly from a binding decision of the Security Council<sup>5</sup>.

1 See generally James Crawford *The Creation of States in International Law* (2nd ed 2006) Ch 3.

2 Eg the forcible exclusion of the existing sovereign: see 'Turkish Republic of Northern Cyprus', HMG MOU (2008) 79 BYIL 622-624; Abkhazia and South Ossetia (2008) 79 BYIL 615-616.

3 Eg the law on self-determination (see the Security Council resolution on Southern Rhodesia: Security Council Resolution 217 of 20 November 1965); or the prohibition of apartheid (see the Security Council resolutions on the South African 'homelands': Security Council Resolutions 402 of 22 December 1976, 417 of 31 October 1977; and see also *Gur Corp v Trust Bank of Africa Ltd* [1987] QB 599, [1986] 3 All ER 449, CA).

4 As to peremptory norms of international law see PARA 11.

5 In addition to the examples cited in note 3, see the Security Council resolutions on: South Africa's continued presence in South West Africa after the termination of the Mandate (Security Council Resolution 276 of 30 January 1970); the 'Turkish Republic of Northern Cyprus' (Security Council Resolution 541 of 18 November 1983); and the incorporation of the territory of Kuwait into Iraq (Security Council Resolution 662 of 9 August 1990).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/5. SUBJECTS OF INTERNATIONAL LAW/(1) INTERNATIONAL LEGAL PERSONALITY/35. Types of states.

### 35. Types of states.

It is a central tenet of the internal independence of a state that its constitution and internal organisation are exclusively matters of domestic concern. There is thus no distinction in general international law between, for example, monarchy and republic or democracy and autocracy. However, states may undertake international obligations which have consequences for their domestic political and economic arrangements, particularly by becoming members of certain international organisations which may stipulate conditions for membership<sup>1</sup>. The distinctions drawn in older textbooks between real and personal unions have little relevance today. The difference between unitary and non-unitary states does have some international legal consequences. Although in principle a treaty is binding upon a state with respect to the whole of its territory<sup>2</sup>, territorial application clauses of various sorts permitting contracting in or out with respect to constituent parts of a federal entity or with respect to overseas or colonial territories have long been familiar<sup>3</sup>.

Various entities which are not states in the sense of international law are nevertheless designated 'states' as constituent parts of the United States, the Commonwealth of Australia, India and the Federal Republic of Germany. This nomenclature has, of course, no effect upon their status, or rather lack of status, in international law but the constituent states of some federal states do have a degree of international capacity and foreign states may be willing to deal with them to a limited extent, for instance, concluding treaties with them or admitting them to international organisations. However, acts or omissions of federal units in violation of the obligations of the federal state will generate international responsibility, regardless of any constitutional infirmity of the federal government to act<sup>4</sup> but some treaties contain 'federal clauses' which take into account problems federal states might have in implementing treaty obligations<sup>5</sup>. Concessions of this sort have been historically significant steps on the road to ultimate independent statehood, particularly in the case of members of the Commonwealth. The grant of original membership of the United Nations to Byelorussia and the Ukraine, which were then merely two of the constituent republics of the Soviet Union, itself also a member, was an anomaly. States may choose to treat entities which do not or only doubtfully satisfy the criteria of statehood as states, so long as doing so does not prejudice the rights of another state, and relations between the two may be governed by international law but these special arrangements have no necessary implications for other states<sup>6</sup>.

1 Eg membership of the Council of Europe requires that states respect the rule of law and human rights: see the Statute of the Council of Europe (London, 5 May 1949; TS 51 (1949); Cmd 7778) art 3.

2 See eg the Vienna Convention of the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 29; and PARA 94.

3 See eg the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 56 para 3.

4 See *LaGrand (Germany v United States of America)* ICJ Reports 2001, 466 at 495 (para 81).

5 See eg the UNESCO Convention for the Protection of the World Cultural and Natural Heritage (Cmnd 9424) (1972) art 34.

6 This may explain the position of the Holy See, which has long been regarded as possessing international personality. The position of the Holy See was to some extent clarified in the Treaty, Concordat and Financial Convention between Italy and the Holy See (the Lateran Treaty) (Rome, 11 February 1929), which created the

Vatican state, withdrawn from the territory of Italy and thus constituting a territorial basis for the statehood of the Holy See: see 23 American Journal of International Law (1929) Supp 187. The Holy See, *eo nomine*, maintains diplomatic relations with some states. The United Kingdom re-established diplomatic relations with the Holy See in 1914, and since 1982 its representative has the rank of ambassador. The Holy See is now represented in the UK by an apostolic nuncio. The Holy See has entered into treaties with other states, including some which have been concluded under the auspices of the United Nations, for example, the Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565).

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### 36. International organisations.

International organisations which have states as members are almost always founded on a constituent treaty, which establishes the purpose of the organisation, the conditions for membership and the organisational structure by which its purposes will be realised<sup>1</sup>. The treaty will govern relations between members and the organisation and it may provide that certain decisions will be binding on the members<sup>2</sup>, though, in the main, organisations are restricted to making recommendations to their members. There are many international organisations, some with very wide membership, some with only a few members, and with a wide range of functions, from the great political, economic and social ambitions of the United Nations to the precise functional objectives of, for example, International Maritime Organisation<sup>3</sup>. That they may have an international personality separate from that of their members was confirmed by the International Court of Justice<sup>4</sup>. When they are based on treaty, international organisations have no automatic rights with respect to non-members<sup>5</sup> although, in fact, non-member states seem to be prepared to accept the legal existence of international organisations and deal with them as necessary. International customary law allows certain rights and powers to international organisations, notably the capacity to enter into treaties and otherwise participate in international law-making, to enjoy international immunities and to make international claims and bear international responsibility. Although the terms of an organisation's basic treaty will generally prevail, it is not too much to speak of a 'law of international organisations' in addition to each treaty's particularities<sup>6</sup>. It may require specific legislation to provide for the personality of international organisations in domestic law and to assure the implementation of their rights under international law<sup>7</sup>.

1 See PARA 517 et seq.

2 See eg the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) arts 25, 27; and PARA 523.

3 As to the International Maritime Organisation see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 13.

4 See the *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* ICJ Reports 1949, 174.

5 However the International Court of Justice was prepared to concede the 'objective' personality of the United Nations: see the *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* ICJ Reports 1949, 174 at 185.

6 See PARA 517 et seq.

7 For example, in the UK, see the International Organisations Act 1968; the International Organisations Act 2005; and PARA 307 et seq.



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### 37. Individuals.

For many years, there were serious doubts about whether individuals could have international personality. They were treated as 'objects' of international legal rules and the vindication of their interests was in the hands of their national states through the mechanism of diplomatic protection. It was the states which were the subjects of the relevant rules. This position, which still retains its importance<sup>1</sup>, has been modified in a number of ways. Principally, this has been through the development of the law of human rights but whether or not an individual has rights under the customary law of human rights is not clear<sup>2</sup>. In the main, an individual depends upon the participation of the state within the jurisdiction of which he finds himself to be a party to an international human rights treaty, which itself provides a mechanism by which the person may take towards vindicating his rights<sup>3</sup>. Otherwise, it will be necessary for him to rely on the domestic implementation of the international human rights obligations, when his rights will be rights in national law rather than international law<sup>4</sup>. Recently, the International Court of Justice has said that, where states use clear language, they may confer rights on individuals in international law in fields other than human rights, though in the particular case, the protection of those rights at the international level would still depend upon the national state<sup>5</sup>. In addition to rights, individuals have duties in international law, which will impose upon them international criminal liability in the event of their violation. Increasingly, the possibility arises that prosecution for breaches of international criminal law may take place before international criminal tribunals<sup>6</sup>. It is important to appreciate that there is no category of personality of 'individuals' in international law and in each case, it will be necessary to identify the source of the rules of law which provide rights or impose duties on this particular person.

1 See the Articles on Diplomatic Protection, arts 34-50, Report of the International Law Commission, 58th Session (2006), A/61/10, ch IV; and as to diplomatic protection see PARA 385 et seq.

2 See **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 See eg the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 34 (individual access to the European Court of Human Rights); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. Participation by individuals in human rights procedures is sometimes by direct complaint to the UN Human Rights Committee under the optional protocol, and is not always by way of a judicial procedure: see the International Covenant on Civil and Political Rights (New York, 16 December 1966; ratified by the United Kingdom 20 May 1976; TS 6 (1977): Cmnd 6702), (First) Optional Protocol.

4 See eg for the UK, the Human Rights Act 1998; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

5 See *LaGrand (Germany v United States of America)* ICJ Reports 2001, 466 at 494 (para 77).

6 See PARA 421 et seq.

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### **38. Other international persons.**

The categories of international person are not closed. Developments in the law have established the status of 'peoples' entitled to self-determination<sup>1</sup> and, arguably, to indigenous peoples<sup>2</sup> and minorities<sup>3</sup>. Equally, ad hoc personality, where an entity is treated as having certain rights and duties in international law without falling into the established classes of personality, is not uncommon. Entities like Taiwan, which do not seek independent statehood, may, nonetheless, be dealt with in some respects by some states as having some international rights<sup>4</sup>. In the nature of things, it is impossible to deal comprehensively with these ad hoc legal persons.

1 See the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514 (XV) of 14 December 1960; and *East Timor (Portugal v Australia)* ICJ Reports 1995, 90 (para 29).

2 See the Declaration on the Rights of Indigenous Peoples, arts 1, 3, General Assembly Resolution 61/295 on 13 September 2007.

3 Human rights instruments protect individual members of minorities rather than minority groups themselves: see the International Covenant on Civil and Political Rights (New York, 16 December 1966; ratified by the United Kingdom 20 May 1976; TS 6 (1977): Cmnd 6702) art 27.

4 Taiwan is a member of several international organisations, including the World Trade Organisation.

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## **(2) STATES AND GOVERNMENTS**

### **(i) Recognition**

#### **A. IN GENERAL**

##### **39. Recognition and United Kingdom domestic law.**

Recognition of states and governments is the most important use of the recognition power, although the United Kingdom's policy is no longer to recognise governments<sup>1</sup>. In addition to its consequences in international law<sup>2</sup> recognition also has important effects in domestic law; notably that only recognised states and authorities with which the British government has government-to-government dealings may bring actions in UK courts and be entitled to state immunity<sup>3</sup>. Equally, subject to some exceptions, the English courts, when so directed by the English conflict of laws, will take cognisance of the laws and decrees only of recognised states or of authorities with which the British government has government-to-government dealings<sup>4</sup>.

1 As to the recognition power in the United Kingdom see PARA 45.

2 See PARA 41 et seq.

3 As to state immunity see PARA 242 et seq.

4 In general, this presents few problems: the status of the foreign state will not be contested and, if it is, that matter would be settled by a certificate from the Foreign and Commonwealth Office saying whether or not the British government had recognised the state: see eg *Gur Corpn v Trust Bank of Africa Ltd* [1987] QB 599, [1986] 3 All ER 449, CA (Ciskei); and PARAS 15, 43. If the case is concerned with the status of a foreign government, again there will be no difficulties about settled governments. Where the status of a government is contested, evidence, possibly in the form of a certificate from the FCO, may be obtained with the object of establishing whether or not the British government has government-to-government dealings with the foreign authorities: see eg *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, [1921] All ER Rep 138 (Soviet government of USSR); *Republic of Somalia v Woodhouse, Drake and Carey (Suisse) SA, The Mary* [1993] QB 54, [1993] 1 All ER 371 (government of Somalia); and PARAS 15, 45.

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#### **40. The exercise of the recognition power of the United Kingdom.**

In English law, recognition of states<sup>1</sup>, the institution of diplomatic relations and the establishment of government-to-government dealings<sup>2</sup> are for the Executive in the exercise of the prerogative on foreign affairs<sup>3</sup>. The fact of recognition of statehood and the measure of government-to-government dealings are communicated to the courts by the government by executive certificate<sup>4</sup>, conclusively on the matter of recognition of states, of great weight on the assessment of the dealings with a foreign authority<sup>5</sup>.

1 For example, the recognition of Kosovo as a state was announced by the Prime Minister on 18 February 2008: see (2008) 79 BYIL 604.

2 The government sometimes makes it clear that it does not regard its dealings with a foreign entity as amounting to government-to-government activity: see eg (2006) 79 BYIL 618.

3 See **FOREIGN RELATIONS LAW** vol 18(2) (Reissue) PARA 606.

4 See *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, [1921] All ER Rep 138.

5 See *Republic of Somalia v Woodhouse, Drake and Carey (Suisse) SA, The Mary* [1993] QB 54, [1993] 1 All ER 371.

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#### **41. Recognition in international law.**

Recognition in international law concerns several different factual situations which call for reactions from states. These include: (1) the appearance of new states; (2) unconstitutional changes of governments; (3) territorial changes<sup>1</sup>; and (4) the existence of belligerent parties to a civil war<sup>2</sup>. The following paragraphs are concerned only with recognition of new states and how the United Kingdom government deals with new governments<sup>3</sup>.

1 As to recognition of territorial changes see Oppenheim's International Law (9th Edn) pp 187-197.

2 As to recognition of belligerency and insurgency see Oppenheim's International Law (9th Edn) pp 165-169; and *WJ Tatem Ltd v Gamboa* [1939] 1 KB 132, [1938] 2 All ER 135.

3 See PARA 42 et seq.

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## 42. Methods of recognition.

Recognition of a state can be express or implied. Express recognition takes place by a formal notification or declaration announcing the intention of recognition, such as a note addressed to the state which is to be recognised. Implied recognition takes place by means of an act which leaves no doubt as to the intention to grant it<sup>1</sup> but which does not refer expressly to recognition. There are very few acts from which recognition of a state may be implied, and the formal exchange of diplomatic representatives is the only unequivocal example<sup>2</sup>. The words of a state denying an intention to recognise will ordinarily be sufficient to prevent an implication of recognition. Because bilateral treaties may be entered into with non-state international persons, recognition of statehood may not necessarily be implied from this kind of relationship<sup>3</sup>. Nor is recognition necessarily implied from participation with the unrecognised state in an international conference<sup>4</sup>, in the conclusion of a multilateral treaty to which that state is a party<sup>5</sup>, in the retention of diplomatic representatives in the foreign state for a period after a revolutionary change of government, or from the admission of the unrecognised state to an international organisation. However, the United Kingdom accepts that the act of voting for the admission of a new Member to the UN amounts to recognition of the statehood of the applicant<sup>6</sup>. Recognition must be distinguished from entering into diplomatic relations; a state will remain recognised though diplomatic relations have not been established with it, or have been broken off<sup>7</sup>.

1 A formal statement that conduct is not to be taken as amounting to recognition is sometimes made, as when the United Kingdom stated that documents concerning the partition of Vietnam in 1954 did not involve United Kingdom recognition of North Vietnam: see Vietnam and the Geneva Agreements 1956 (London, 30 March to 8 May 1956; Vietnam No 2 (1956); Cmd 9763). A similar provision in respect of the government of Taiwan appears in the Agreement for the Regulation of the Production and Marketing of Sugar (London, 16 to 31 October 1953; TS 28 (1956); Cmd 9815). Sometimes the United Kingdom government makes it clear that it does not regard its dealings with a foreign entity as government-to-government activity from which recognition might be implied: see eg 683 HL Official Reports (5th series), 14 June 2006, col 212.

2 In the past, however, the United Kingdom government has received agents representing regimes before recognition was accorded. As to reception of agents from the confederate states during the American Civil War see 1 Moore's Digest 209; and as to the exchange of agents with the Spanish nationalist authorities see 334 HC Official Report (5th series), 4 April 1938, col 4. The existence of consular relations does not necessarily imply recognition. The United Kingdom government maintained a consul in Taiwan (Formosa) for some years after 1950, although it did not recognise the government of the whole of China (which is what it claimed to be) or that there was a new state of Taiwan on that island: 695 HC Official Report (5th series), 15 May 1964, cols 836-837; 696 HC Official Report (5th series), 15 June 1964, col 908. Possibly the issue by this country of an exequatur to a consular representative of a foreign state might be taken as implying recognition of the government of that state: 1 Oppenheim's International Law (9th Edn) p 171.

3 If the agreement is for a limited purpose, recognition will not always be implied. This was the case with the Agreement between the governments of Great Britain and Russia for the Exchange of Prisoners of War (12 February 1920; 1 Lo N TS 264; Cmd 587). In November 1920, the English court was informed that 'His Majesty's government have not recognised the Soviet government in any way': *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 1 KB 456, 2 BILC 85.

4 Thus the United Kingdom government did not recognise the government of North Vietnam by taking part with it in the conference of 1953-54: see note 1.

5 The United Kingdom and the German Democratic Republic were both parties to the Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water (Moscow, 5 August 1963; TS 3 (1964); Cmd 2245), although the United Kingdom did not at that time recognise that state, nor did it recognise it as a party to the Treaty. See also PARA 46.

6 In 1991, the United Kingdom supported the admission to the United Nations of the Democratic People's Republic of Korea and thereby recognised it: 669 HC Official Report (6th series), 16 October 1991, col 156W.

7 There were no plans to establish diplomatic relations with the Democratic People's Republic of Korea: see note 6.

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### **43. Recognition of new states.**

In 1980, the government announced a new policy on the recognition of governments<sup>1</sup> but at the same time, it confirmed its policy on the recognition of states<sup>2</sup>. The government continues to recognise new states in accordance with international doctrine<sup>3</sup> and will do so if the entity has, and seems likely to continue to have, a clearly defined territory with a population, a government which is able of itself to exercise effective control of that territory, and independence in its external relations<sup>4</sup>. Satisfaction of the 'Montevideo criteria' is the minimum condition for recognition but the government may impose other conditions before it will recognise another state<sup>5</sup>. In some cases where the 'Montevideo criteria' are satisfied, there will be obligations arising under customary international law or because of UN resolutions which will preclude recognition or which the government will take into account in determining its policy<sup>6</sup>. Apart from their consequences in international relations, recognition decisions may have important effects in domestic law<sup>7</sup>.

1 See PARA 45.

2 See note 4.

3 As to the definition of 'state' see the Pan-American Convention on the Rights and Duties of States (the 'Montevideo Convention') (Montevideo, 26 December 1933; 165 LoNTS 19; 28 AJIL (Supp) 75) art 1 (which is reflected in the statement in note 4). See also 1 Oppenheim's International Law (9th Edn) pp 130-134.

4 55 HC Official Reports (6th series), 29 February 1984, written answers, col 226; 102 HC Official Reports (6th series), 23 October 1986, written answers, col 997; 105 HC Official Reports (6th series), 12 November 1986, col 100; 126 HC Official Reports (6th series), 3 February 1988, cols 958-959; 169 HC Official Reports (6th series), 19 March 1990, written answers, cols 449-450.

5 See the EC Guidelines on the Recognition of New states in Eastern Europe and in the Soviet Union, 16 December 1991, 62 BYIL 559, which attached further requirements of a political nature in order to determine whether European Union member states should recognise such new states. These guidelines appear, however, to be geographically limited.

6 For the cases of Rhodesia (from 1965 to 1980), the Turkish Republic of North Cyprus (since 1983) and the former South African homelands (Bophuthatswana, Transkei, Ciskei and Venda), in all of which United Nations resolutions called upon member states not to recognise these entities, see 1 Oppenheim's International Law (9th Edn) pp 187-190. As to non-recognition by the United Kingdom of the Republic of Ciskei see *Gur Corp v Trust Bank of Africa Ltd* [1987] QB 599, [1986] 3 All ER 449, CA. As to non-recognition of the Turkish Republic of North Cyprus see *Caglar v Billingham (Inspector of Taxes)* [1996] STC (SCD) 150, Special Commissioners of Inland Revenue; and (2008) 79 BYIL 622-624.

7 See PARA 39.



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## ***B. DEALINGS WITH NEW GOVERNMENTS***

### **44. When recognition has been required.**

The question of a formal act of recognition has not normally arisen unless there has been a change in the head of state or two opposing regimes were each claiming to be the government of a state<sup>1</sup>. Recognition has never been required where the change of government has come about by normal constitutional means. Since 1980 it has been the practice of the United Kingdom not to accord formal recognition, either de jure or de facto, to new governments in a recognised state<sup>2</sup>.

<sup>1</sup> 282 HL Official Report (5th series), 27 April 1967, col 610 (Greece). See also 745 HC Official Report (5th series), 25 April 1967, cols 246-247W (Sierra Leone).

<sup>2</sup> See PARA 45.

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#### **45. New governments.**

In 1980, the United Kingdom government announced that, as a matter of policy, it would no longer accord formal recognition to new governments. It would decide the nature of its dealings with regimes which come to power unconstitutionally in the light of its assessment of whether they are able of themselves to exercise effective control of the territory of the state concerned and seem likely to continue to do so<sup>1</sup>. It will be for others, including the courts, to determine the status of an authority claiming to be the government of a foreign state. The question is whether the authority is a government<sup>2</sup>. If a court concludes that an authority is a government, it seems that it will be treated in English law in the same way as a recognised government once was<sup>3</sup>.

The application of this policy is not without its difficulties where there is more than one authority contending to be the government of the same territory<sup>4</sup>. The policy does not preclude a statement by the British government that it does not regard an authority as the legitimate government of a state<sup>5</sup>.

1 408 HL Official Reports (5th series), 28 April 1980, cols 1121-1122W; 983 HC Official Reports (5th series), 25 April 1980, cols 277-279W; and 985 HC Official Reports (5th series), 23 May 1980, col 385W. This change of policy and practice may constitute an alteration in form rather than substance and if the nature of the dealings amount to treating the regime as the government of the state, that entails the regime being impliedly recognised as such. As to implied recognition see PARA 42. The United Kingdom government continues formally to recognise new states: see PARA 43.

2 See *Republic of Somalia v Woodhouse, Drake and Carey (Suisse) SA* [1993] QB 54, [1993] 1 All ER 371; *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] 2 All ER 821. See also *Gur Corp v Trust Bank of Africa Ltd* [1987] QB 599, [1986] 3 All ER 449, CA, where the foreign state was itself unrecognised. The Foreign and Commonwealth Office will communicate to the courts information about the authority concerned.

3 This is the implication to be drawn from *Republic of Somalia v Woodhouse, Drake and Carey (Suisse) SA* [1993] QB 54, [1993] 1 All ER 371.

4 See *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] 2 All ER 821.

5 See 478 HC Official Report (6th series), 23 June 2008, col 42 (per David Milliband, the Secretary of State for Foreign and Commonwealth Affairs: 'We do not . . . recognise the Mugabe government as the legitimate representative of the Zimbabwean people.')

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**46. States which the United Kingdom government has not recognised and governments with which it has no official dealings.**

If the United Kingdom government has not recognised a foreign state or has no relations on a government-to-government basis with a foreign government it will generally have no official communication with it<sup>1</sup>. Thus, for example, it will not enter into negotiations with it<sup>2</sup>, except for limited purposes; it will not send official delegations to visit it<sup>3</sup>, nor invite its members on official visits to the United Kingdom<sup>4</sup>. Passports issued by such a government are not acceptable as valid travel documents for visits to this country<sup>5</sup>, and its flag will not be recognised<sup>6</sup>. The accession of such a state to a multilateral agreement is not recognised as having the effect of making the state a party to the convention<sup>7</sup>, nor is the signature of its representative of such a convention recognised as a valid signature on behalf of that state<sup>8</sup>. Where the unrecognised state claims to be established on part of the territory of a state recognised by the United Kingdom government, treaties which apply to that state confer no rights on the unrecognised state<sup>9</sup>. However, there may be dealings below the diplomatic level with the authorities of an unrecognised state<sup>10</sup>.

1 696 HC Official Report (5th series), 15 June 1964, col 908. A consul in a country whose government is not recognised will have communication with the local authorities only. The United Kingdom government does not regard it as appropriate to accept consular officers appointed by authorities with which it has no dealings: 696 HC Official Report (5th series), 15 June 1964, col 908; 723 HC Official Report (5th series), 2 February 1966, col 253W; and 448 HC Official Report (6th Series), 14 July 2006, col 2135W.

2 690 HC Official Report (5th series), 24 February 1964, written answers, cols 24-25.

3 737 HC Official Report (5th series), 1 December 1966, written answers, col 128.

4 750 HC Official Report (5th series), 19 July 1967, col 2116.

5 690 HC Official Report (5th series), 25 February 1964, cols 399-400; 743 HC Official Report (5th series), 4 April 1967, written answers, cols 18-19; *Fifth Report of the Foreign Affairs Committee* (HC Paper 473 (2006-07)) para 96 n 3.

6 728 HC Official Report (5th series), 9 May 1966, written answers, col 12 (flag of North Korea on postage stamp).

7 See Fourth Supplementary List of Ratifications, Accessions, Withdrawals etc for 1962 (Cmnd 1988) p 2, referring to the Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw, 12 October 1929; TS 11 (1933); Cmd 4284).

8 See the Protocol for the Further Prolongation of the International Sugar Agreement of 1958 (London, 1 November 1965; TS 28 (1966); Cmnd 3001).

9 688 HL Official Report (6th series), 8 January 2007, col 18W.

10 The UK government has had informal dealings with the authorities in the Turkish Republic of Northern Cyprus: 462 HC Official Report (6th series), 25 June 2007, col 209W; 694 HL Official Report, 25 July 2007, cols 89-90W; and 673 HL Official Report (5th series) 5 July 2005 cols 591-593. As to the differing nature of relations with authorities of a recognised state and relations with an entity not recognised as a state, see 459 HC Official Report (6th Series), 7 March 2007, col 2002W (Somalia and 'Somaliland').

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**47. Status of states not recognised by the United Kingdom government or governments with which it has no official dealings.**

A statement by the government of the United Kingdom that it has 'not recognised' an entity as a state is ambiguous and more information is needed to determine the government's position. It may take the view that the entity is not a state<sup>1</sup>, or that the entity does have the characteristics of a state but the government chooses not to recognise it<sup>2</sup>. The government's policy may be because it has not taken a position on the claim<sup>3</sup>, or it may be because it regards itself as bound not to recognise the entity (even if it has the characteristics of a state) because of a rule of general international law<sup>4</sup> or a decision of the Security Council<sup>5</sup>. More than one rationale may apply to the same case. Whichever of these positions is taken will have consequences for the application of the rules which apply to entities not recognised by the British government.

A foreign state which the United Kingdom government has not recognised or a government with which the United Kingdom government has no dealings on a government-to-government basis has no locus standi in the English courts. Thus it cannot institute an action in the courts<sup>6</sup>, nor can it claim sovereign immunity in respect of an action concerning property in which it claims an interest<sup>7</sup>. The English courts will not give effect to the acts of such a state or government, for example contracts made by it or on its behalf will not be enforced<sup>8</sup>; changes of nationality will not be acknowledged<sup>9</sup>; and legislative and governmental acts, such as decrees affecting property situated within the territory of an unrecognised state or within the territory then being administered by such a government<sup>10</sup>, affecting or winding up a company incorporated in that state<sup>11</sup>, will be disregarded in any action concerning such property or company<sup>12</sup>. The English courts may restrain the acts of a revolutionary government with which the United Kingdom government has no official dealings in this country in order to protect property of a foreign sovereign<sup>13</sup>.

These consequences do not follow if the state and its government are regarded by the United Kingdom government as agents of a state which it recognises as having de jure authority over the territory in question<sup>14</sup>.

1 Which is to say that it does not fulfil the criteria of statehood: see eg 327 HC Official Reports (6th series), 19 March 1999, col 1463 (Tibet not independent); and as to the criteria for statehood see PARA 32 et seq.

2 Given the United Kingdom's policy of recognising entities which do satisfy the criteria of statehood, instances like this are rare but not recognising North Korea from 1953 until its admission to the UN in 1991 is an example.

3 442 HC Official Report (6th series), 16 February 2006, col 2287W (Western Sahara 'status undetermined').

4 This includes respecting the territorial integrity of the existing sovereign: see 450 HC Official Reports (6th series), 24 October 2006, col 1776W (Somaliland).

5 See eg the Security Council resolutions on the South African 'homelands': Security Council Resolutions 402 of 22 December 1976, 417 of 31 October 1977.

6 *City of Berne v Bank of England* (1804) 9 Ves 347, 2 BILC 1. See also *Dolder v Lord Huntingfield* (1805) 11 Ves 283, 2 BILC 1. The same has been held in the United States in *Russian Socialist Federated Soviet Republic v Cibrario* 235 NY 255 (1923).

7 *The Annette, The Dora* [1919] P 105, 2 BILC 76 (leaving open the possibility that such a government in possession of property might be able to claim immunity). The questions are whether, if such a government be sued eo nomine, the action cannot be maintained, upon the ground that it has no existence in the eyes of the English court, and whether, if it can be so sued, it can claim immunity, appear never to have been raised. The United States courts have upheld a plea of immunity by an unrecognised government: *Wulfsohn v Russian Socialist Federated Soviet Republic* 234 NY 372 (1923). As to state immunity see PARA 242 et seq.

8 *Thompson v Powles* (1828) 2 Sim 194, 2 BILC 20; *Taylor v Barclay* (1828) 2 Sim 213, 2 BILC 28. See also *Jones v Garcia del Rio* (1823) Turn & R 297, 2 BILC 13; *Thomson v Byree* (1828) Times, 31 May, 2 BILC 20; *Thompson v Barclay* (1831) 9 LJOS Ch 215, 2 BILC 32. It seems, however, that, even in the case of a contract with an unrecognised state or government, property acquired under it cannot be recovered if the contract is broken: *Republic of Peru v Dreyfus Bros & Co* (1888) 38 Ch D 348 at 362, 2 BILC 57.

9 *Murray v Parkes* [1942] 2 KB 123, [1942] 1 All ER 558, 4 BILC 480.

10 *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 1 KB 456, 2 BILC 85 (revsd after recognition had been granted [1921] 3 KB 532, 2 BILC 97, CA) (see PARA 51); *The Ramava* (1941) 75 ILT 153. It should be noted that whether the law of a foreign state will be applicable in an English court will be decided according to the English conflict of laws, and where the English court is referred to the law of an unrecognised state or an act of a government with which it does not have government-to-government dealings, these rules will apply: see **CONFLICT OF LAWS**.

11 *Eastern Carrying Insurance Co v National Benefit Life and Property Assurance Co Ltd* (1919) 35 TLR 292, 2 BILC 81; *Carl Zeiss Stiftung v Rayner and Keeler Ltd* [1967] 1 AC 853, sub nom *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1966] 2 All ER 536, HL. In the latter case, however, Lord Wilberforce at 953 and 577 stated that it is an open question whether the English courts must treat all acts of a government with which the United Kingdom government has no dealings on a government-to-government basis as absolutely invalid. See also *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] QB 205 at 218, [1978] 1 All ER 277 at 283, CA, per Lord Denning MR. See also *Caglar v Billingham (Inspector of Taxes)* [1996] STC (SCD) 150 (for court to take cognisance of acts of unrecognised state would be contrary to the foreign policy of the government); cf *Emin v Yeldag (A-G and the Secretary of State for Foreign and Commonwealth Affairs intervening)* [2002] 1 FLR 956, [2001] All ER (D) 501 (Nov) (private acts taking place within the territory of an unrecognised government could be taken account of by English court, though note that the executive intervened on the side of the applicant). As to the position of foreign corporations see now the Foreign Corporations Act 1991; and PARA 48. For a decision of the International Court of Justice to the effect that not all acts of an unrecognised authority should be disregarded see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Request for Advisory Opinion)* ICJ Reports 1971, 359.

12 The United States courts have on occasion taken the view that acts of an unrecognised government may be regarded as valid: see *Sokoloff v National City Bank* 623 NY 158 (1920); *Salimoff & Co v Standard Oil Co of New York* 262 NY 220 (1933); *Upright v Mercury Business Machines Co Inc* 213 NYS 2d 417 (1961).

13 *Emperor of Austria v Day and Kossuth* (1861) 3 De GF & J 217, 1 BILC 45, CA.

14 *Carl Zeiss Stiftung v Rayner and Keeler Ltd* [1967] 1 AC 853, sub nom *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1966] 2 All ER 536, HL; *GUR Corp v Trust Bank of Africa Ltd* [1987] QB 599, [1986] 3 All ER 449, CA.

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#### **48. Foreign corporations.**

If, at any time, any question arises whether a body which purports to have, or which appears to have lost, corporate status under the laws of a territory which is not at that time a recognised state<sup>1</sup> should or should not be regarded as having legal personality as a body corporate under English law, then, if it appears that the laws of that territory are at that time applied by a settled court system in that territory, that question and any other material question<sup>2</sup> relating to the body is to be determined, and account is to be taken of those laws, as if that territory were a recognised state<sup>3</sup>.

1 A 'recognised state' is a territory which is recognised by the United Kingdom government as a state: Foreign Corporations Act 1991 s 1(2)(a). The laws of a territory which is recognised as a state include the laws of any part of the territory which are acknowledged by the federal or other central government of the territory as a whole: s 1(2)(b). The Foreign Corporations Act 1991 extends to Northern Ireland: s 2(1), (2). As to the meaning of 'United Kingdom' see PARA 30 note 3.

2 A 'material question' is a question, whether as to capacity, constitution or otherwise which, in the case of a body corporate, falls to be determined by reference to the laws of the territory under which the body is incorporated: s 1(2)(c). Any registration or other thing done before the coming into force of s 1 is to be regarded as valid if it would then have been valid had the Foreign Corporations Act 1991 s 1(1), (2) been in force: s 1(3).

3 Foreign Corporations Act 1991 s 1(1). See *R v Minister of Agriculture Fisheries and Food, ex p SP Anastasiou (Pissouri) Ltd* [1994] ECR I-3087, [1995] 1 CMLR 569, ECJ.

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#### **49. Construction of documents.**

In cases where it falls to the English court to interpret in a document a term such as 'state' or 'government', used in a statute<sup>1</sup> or commercial agreement<sup>2</sup>, regard must be had to the intention of those who framed the document; and the fact that the Crown has not recognised the state or has no official dealings with the government in question may not be conclusive as to the meaning of the document.

1 *Re Al-Fin Corpn's Patent* [1970] Ch 160, [1969] 3 All ER 396, 9 BILC 1, disapproving *Re Harshaw Chemical Co's Patent* [1965] RPC 97, 8 BILC 1 (meaning of 'foreign state' as used in the Patents Act 1949 s 24(2) (repealed)).

2 *Luigi Monta of Genoa v Cechofracht Co Ltd* [1956] 2 QB 552, [1956] 2 All ER 769, 7 BILC 540 (meaning of 'government' in charterparty). See also *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co Ltd* [1939] 2 KB 544, [1939] 1 All ER 819, CA (meaning of 'war'); *Reel v Holder* [1981] 3 All ER 321, [1981] 1 WLR 1226, CA (meaning of 'country' in rules of international sporting association).

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## 50. Legal effects of recognition or government-to-government dealings.

The recognition of a foreign state or the existence of government-to-government dealings reverses the consequences of non-recognition or the absence of such dealings.<sup>1</sup> A recognised state or a regime with which the government has government-to-government dealings may sue<sup>2</sup>, and may claim state immunity if sued, in an English court<sup>3</sup>. Acts of a recognised state or of a regime with which the government has government-to-government dealings are generally recognised as valid and are given effect in accordance with the rules of the conflict of laws<sup>4</sup>. It is sometimes said that courts 'take cognisance' of the acts of a foreign state to distinguish this judicial reaction from the act of recognition which falls within the power of the Executive<sup>5</sup>. Contracts made with and by a foreign recognised regime are valid and enforceable<sup>6</sup>, and legislative and executive acts such as decrees affecting property within the state whose territory is administered by a recognised regime<sup>7</sup> and legislation winding up<sup>8</sup> or affecting<sup>9</sup> a company incorporated there will be given effect in the English courts, so long as it conforms to English public policy and unless it is established that the foreign law is a serious violation of a fundamental rule of international law<sup>10</sup>. A recognised regime may claim the public property of the state<sup>11</sup> and the records and state archives deposited in England by a previous regime<sup>12</sup>. Further, the acts of a recognised regime will not be treated as the acts of a usurped authority within the meaning of a general insurance policy, even though the regime has come to power by revolutionary means<sup>13</sup>.

1 As to the status of an unrecognised government (which is to say, an authority with which the British government does not have government-to-government dealings), see PARA 47; and as to the distinction between de facto and de jure recognition see PARA 51.

2 As to the right of a foreign state or government to sue in an English court see PARA 262.

3 *The Gagara* [1919] P 95, 2 BILC 71, CA; *Government of the Republic of Spain v SS Arantzazu Mendi* [1939] AC 256, [1939] 1 All ER 719, 2 BILC 198, HL. As to state immunity see PARA 242.

4 For the relevant rules of the conflict of laws see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 139 et seq.

5 See generally O'Connell *International Law* (2nd ed 1970) Ch 6.

6 *Republic of Peru v Peruvian Guano Co* (1887) 36 ChD 489, 2 BILC 273; *Republic of Peru v Dreyfus Bros & Co* (1888) 38 ChD 348, 2 BILC 57.

7 *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, 2 BILC 97, CA; *Princess Paley Olga v Weisz* [1929] 1 KB 718, 2 BILC 136, CA. As to establishing title to property see *In AY Bank Ltd (in liquidation) v Bosnia and Herzegovina* [2006] EWHC 830 (Ch), [2006] 2 All ER (Comm) 463; and *Republic of Croatia v Republic of Serbia* [2009] EWHC 1559 (Ch), [2010] 1 P&CR 64, [2009] All ER (D) 30 (Jul).

8 *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, 1 BILC 443, HL.

9 *Carl Zeiss Stiftung v Rayner and Keeler Ltd* [1967] 1 AC 853, sub nom *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1966] 2 All ER 536, HL.

10 As to acts of foreign governments which are contrary to English public policy see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 422. English public policy would not permit the enforcement or recognition of a foreign law which constituted 'a gross violation of established rules of international law of fundamental importance': see *Kuwait Airlines Corp v Iraqi Airlines Co (No.2)* [2002] UKHL 19, [2002] 2 AC 883, at [29], per Lord Nicholls. See also *Anglo-Iranian Oil Co Ltd v Jaffrate, The Rose Mary* [1953] 1 WLR 246, Aden SC.



11 *Haile Selassie v Cable and Wireless Ltd (No 2)* [1939] Ch 182, [1938] 3 All ER 677, 2 BILC 171. For the distinction in this respect between de facto and de jure governments see PARA 51.

12 *Union of Soviet Socialist Republics v Onou* (1925) 69 Sol Jo 676, 2 BILC 134.

13 *White, Child and Beney Ltd v Eagle Star and British Dominions Insurance Co, White, Child and Beney Ltd v Simmons* (1922) 127 LT 571, 2 BILC 126, CA.

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## 51. Recognition of de facto and de jure regimes.

A regime which is recognised by the Crown as exercising de facto governmental authority in the territory, or the relevant area of the territory, of a foreign state, will be treated by the English courts on the same footing for most purposes as a government recognised as the de jure government<sup>1</sup> in respect of such territory over which it exercises actual authority since it has full responsibility there<sup>2</sup>. Thus its legislative and executive acts which affect property situated<sup>3</sup> or companies incorporated in that territory<sup>4</sup> will be given effect in the English courts. It is entitled to plead state immunity in respect of an action concerning any property of which it is in possession or control, even in an action commenced by the government recognised de jure<sup>5</sup>. This status and immunity will continue until the de jure government regains control, and a fortiori continues should it never do so<sup>6</sup>. However, as regards property belonging to the state situated outside the territory controlled by the de facto government and claimed by the de jure government, the title of the de jure government will prevail<sup>7</sup>. Should the de jure government regain control and nullify the acts of the de facto government, the acts of the latter will be treated as void<sup>8</sup>.

1 In view of the policy of the United Kingdom government not to accord formal recognition to governments, the distinction drawn in this paragraph will rarely arise in practice. However, it may do so if there exist more than one government contending for power in a recognised state and exercising governmental authority over the territory which each controls, as was the case during the Spanish Civil War (1936-39). It would seem to be necessary that the United Kingdom government had government-to-government relations with both authorities for a court to be able to reach the conclusion that both were governments.

2 *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, 2 BILC 97, CA; *White, Child and Beney Ltd v Eagle Star and British Dominions Insurance Co, White, Child and Beney Ltd v Simmons* (1922) 127 LT 571, 2 BILC 126, CA.

3 *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, 2 BILC 97, CA.

4 *Bank of Ethiopia v Bank of Egypt and Liguori* [1937] Ch 513, [1937] 3 All ER 8, 2 BILC 146; *Banco de Bilbao v Sancha, Banco de Bilbao v Rey* [1938] 2 KB 176, [1938] 2 All ER 253, 2 BILC 152, CA.

5 *Government of the Republic of Spain v SS Arantzazu Mendi* [1939] AC 256, [1939] 1 All ER 719, 2 BILC 198, HL. On the relevance of concurrent recognition of the de facto and de jure governments see *The Abodi Mendi* [1939] P 178, sub nom *Spanish Republican Government v Abodi Mendi* [1939] 1 All ER 701, 3 BILC 449, CA; *The Arraiz* (1938) 61 Ll L Rep 39, 3 BILC 422; *The El Neptuno* (1938) 62 Ll L Rep 7, 3 BILC 850. See also PARA 256.

6 See *Civil Air Transport Inc v Central Air Transport Corp* [1953] AC 70 at 93, [1952] 2 All ER 733 at 744, 7 BILC 523, PC.

7 *Haile Selassie v Cable and Wireless Ltd* [1938] Ch 839, [1938] 3 All ER 384, 3 BILC 165, CA (plea of sovereign immunity by de facto government); *Haile Selassie v Cable and Wireless Ltd (No 2)* [1939] Ch 182, [1938] 3 All ER 677, 2 BILC 171 (earlier decision reversed by the Court of Appeal after recognition of de facto government as de jure sovereign).

8 See *Civil Air Transport Inc v Central Air Transport Corp* [1953] AC 70 at 93, [1952] 2 All ER 733 at 744, 7 BILC 523, PC.

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## 52. Retroactivity of recognition.

Upon recognition by the United Kingdom, the government of the newly recognised state has been treated generally as having been the government of the state in question since the date at which it began to exercise actual governmental authority over the territory of that state<sup>1</sup>. Therefore its legislative and executive acts, such as decrees affecting persons and property within the territory of that state<sup>2</sup>, and those winding up or affecting companies incorporated there<sup>3</sup>, which were enacted during the time between that date and the date at which recognition is accorded, will be given effect by the English courts. For this purpose the date to which recognition is retroactive is that given by statute or by a statement of the executive if any<sup>4</sup>, in the absence of which the question must be decided by the court upon the facts, that is to say, from the date the entity can show that it was a state or from which the foreign government can show that it had government-to-government relations with the United Kingdom government<sup>5</sup>. However, recognition has only operated retroactively to validate the acts of the newly recognised government, and it has not been treated as invalidating the acts of the previously recognised de jure government of the state in respect of persons and property, at any rate where these were not at the relevant time within the territory effectively controlled by the newly recognised government<sup>6</sup>. Retroactivity may still be relevant, although the United Kingdom government no longer accords formal recognition to new governments<sup>7</sup>.

1 For the purpose of retroactivity of recognition, English law has not distinguished between de jure and de facto of recognition: see *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, 2 BILC 97, CA.

2 *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, 2 BILC 97, CA (in which the Court of Appeal followed the decisions of the Supreme Court of the United States in *Oetjen v Central Leather Co* 246 US 297 (1918); *Underhill v Hernandez* 168 US 250 (1897); and *Williams v Bruffy* 96 US 176 (1877)). See also *Ricaud v American Metal Co* 246 US 304 (1918); *Princess Paley Olga v Weisz* [1929] 1 KB 718, 2 BILC 136, CA.

3 *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, 1 BILC 443, HL. See also *Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] AC 112, 1 BILC 331, HL; *Banque Internationale de Commerce de Petrograd v Goukassow* [1925] AC 150, 2 BILC 355, HL; *Employers' Liability Assurance Corp'n v Sedgwick Collins & Co* [1927] AC 95, 1 BILC 365, HL.

4 This may be inferred from *Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna v Boguslawski* [1953] AC 11, [1952] 2 All ER 470, 7 BILC 499, HL; and see *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532 at 544, 2 BILC 97, CA, per Bankes LJ; *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, 1 BILC 443, HL; *Kolbin & Sons v Kinnear & Co Ltd* 1930 SC 724 (affd 1931 SC 128).

5 See *White, Child and Beney Ltd v Eagle Star and British Dominions Insurance Co, White, Child and Beney Ltd v Simmons* (1922) 127 LT 571, 2 BILC 126, CA.

6 *Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna v Boguslawski* [1953] AC 11, [1952] 2 All ER 470, 7 BILC 499, HL; *Civil Air Transport Inc v Central Air Transport Corp'n* [1953] AC 70, [1952] 2 All ER 733, 7 BILC 523, PC.

7 See PARA 51 note 1.

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## **(ii) Succession of States and Governments**

### **A. STATE SUCCESSION**

#### **53. In general.**

The term 'state succession'<sup>1</sup> is employed to describe a great variety of situations involving changes in sovereignty over territory<sup>2</sup>. One possible case is where the whole of the territory of state A becomes absorbed by state B, state A being extinguished. Another is where state B is created out of part of the territory of state A, which continues to survive with diminished territory. But there are many possible intermediate situations, such as that where the territory of state A is divided, wholly or partly, between B and C, where B is created out of the territory of A and C, where part of the territory of a state is placed under an international or quasi-international regime such as a mandate or trusteeship, where a mandated or trust territory becomes a state, and so forth. These various situations, moreover, may be brought about in many different ways, for example by treaty of merger between states, by peaceable constitutional partition of a single state, by revolution and ultimate recognition of the establishment of a new state, or by some species of award or adjudication of a concert of the principal powers. The area and population changing hands, also, may be considerable or it may be virtually insignificant<sup>3</sup>. The disintegration of a state into a number of successor states may require an agreement between them on matters of succession, as well as with other states affected by the changes<sup>4</sup>. Agreements between the entities involved may be of importance in determining how other states view the nature of any changes and the identity of the states which emerge<sup>5</sup>. Not surprisingly, therefore, no rules as to the extinction or transmission of all types of international legal rights and obligations exist or apply in every case of state succession<sup>6</sup>.

1 See generally O'Connell's State Succession in Municipal Law and International Law; O'Connell's Law of State Succession (containing an appendix of law officers' opinions on the subject); and 1 Oppenheim's International Law (9th Edn) 208-244.

2 The Convention on Succession of States in respect of Treaties (Vienna, 22 August 1978; Misc 1 (1980); Cmnd 7760) defines 'succession of states' as the replacement of one state by another in the responsibility for the international relations of territory: see art 2 para 1(b) (although note that the United Kingdom is not a party to this convention). As to the difficulties in identifying continuing and successor states see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections)* ICJ Reports 1996, 595; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia v Montenegro)* ICJ Reports, 26 February 2007; and *Legality of the Use of Force (Serbia and Montenegro v United Kingdom) (Preliminary Objections)* ICJ Reports 2004, 1307.

3 As to attempted classifications of the various types of state succession and the means or modalities by which they may be brought about see especially 7 Verzijl's International Law in Historical Perspective 3-15; First Report of the Special Rapporteurs on Succession in respect of Rights and Duties resulting from Sources other than Treaties, YILC 1968 vol II, 94 at 100-106.

4 See the *Agreement on Succession Issues Between the Five Successor States of the Former Yugoslavia* 41 ILM (2002) 3; considered in *AY Bank Ltd (in liquidation) v Bosnia and Herzegovina* [2006] EWHC 830 (Ch), [2006] 2 All ER (Comm) 463. See also Shaw *International Law* (6th Edn, 2008) pp 962-963.

5 For example, the changes to the Soviet Union in 1991, which the participants regarded as a series of secessions by the new states from the old USSR, which continued as the state of Russia: see 31 ILM (1992) 138, 151.

6 Note the importance of previous territorial arrangements of the colonial powers for states succeeding by way of self-determination because of the doctrine of *uti possidetis*: see *Frontier Dispute (Burkina Faso/Republic of Mali)* ICJ Reports 1986, 554.

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#### **54. Appurtenant rights and obligations.**

A right appurtenant to a particular portion of territory passes with that portion to another sovereign. Thus the air space above the land will pass with the land, and rights and obligations vested in a riparian state will pass with the river bank. Sovereignty over the territorial sea and sovereign rights over the continental shelf will similarly pass with the land territory<sup>1</sup>.

<sup>1</sup> However, since the delimitation of sea areas always has a subjective element in it, if the pretensions of the predecessor state are either greater or less than those which the successor state itself advances with respect to other areas of the sea, they are not necessarily binding upon the successor state. As to state succession in relation to the territorial sea see 7 Verzijl's International Law in Historical Perspective 326-343; and as to succession to non-sovereign regimes such as protectorates, mandates and trust territories and belligerent occupation see 7 Verzijl's International Law in Historical Perspective 233, 314. As to air space see PARA 197 et seq; as to the territorial sea see PARA 123; and as to the continental shelf see PARA 163 et seq.

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## **55. Servitudes.**

The notion of a right in rem in international law running with the land, though strongly contended for, cannot be said to be wholly established<sup>1</sup>. To a degree the International Court of Justice has acknowledged the possibility of a customary right of passage across territory available against a succession state. But inasmuch as the right in question was held not to be general, being inapplicable to armed forces and the like, it cannot very usefully be described as a servitude<sup>2</sup>. Where jura in re aliena in international law are grounded in treaty the question of their availability against or for the benefit of a succession of an original contracting party is simply one of succession in relation to treaties<sup>3</sup>.

1 See generally Vali's Servitudes of International Law (2nd Edn, 1958).

2 *Right of Passage over Indian Territory (Portugal v India)* ICJ Reports 1960, 6. As to the International Court of Justice see PARA 499 et seq.

3 As to state succession in respect of dispositive treaties see PARA 59.

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## **B. TREATY RIGHTS AND OBLIGATIONS**

### **56. In general.**

According to the principle of the moving treaty frontier, a treaty applies to the whole of the territory of a state, and thus its ambit expands or contracts as the territory of any party expands or contracts. Therefore, a state which loses territory is discharged from treaty obligations<sup>1</sup> and ceases to enjoy treaty rights in respect of any territory which it loses. If the territory is lost to another existing state which is also bound by the treaty towards third states, that territory passes out of the treaty regime of the predecessor state into that of the successor state<sup>2</sup>. The same rule may apply also where a state merges with others to become a new state or a union in which it is the predominant partner<sup>3</sup>. States may make specific provision with new states about the continuation of previous treaty arrangements which apply to the territory of the new state<sup>4</sup>.

1 The Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) provides that a state is bound by a treaty in respect of any territory of which it is sovereign: see art 29; and PARA 94. Equally it is not bound by a treaty in respect of territory of which it is no longer sovereign.

2 Rules respecting state succession to treaties were included in the Convention on Succession of States in respect of Treaties (Vienna, 22 August 1978; Misc 1 (1980); Cmnd 7760): see PARAS 58-62. The United Kingdom is not a party. Evidence of clear rules of customary international law is lacking: see 1 Oppenheim's International Law (9th Edn) 236.

3 The matter was much discussed in relation, for example, to the formation of the German Empire out of the state of Prussia and a number of lesser states in 1871. See the International Law Commission's Draft Articles of 1972, art 19, YILC 1972 vol II, 18-35.

4 See eg the Affidavit of the Deputy Legal Adviser, FCO in *R v Foreign and Commonwealth Office, ex p International Transport Federation* (1998) and related materials (Ukraine), UKMIL (1998) 69 BYIL 482-487; FCO statement on succession with respect to Montenegro, UKMIL (2007) 78 BYIL 673, 685.



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## **57. Territorial application clauses.**

The position of former colonial territories with regard to treaties entered into by their mother state, after their independence, is influenced by the existence in some such treaties of territorial or colonial application clauses<sup>1</sup>. These in effect permit non-metropolitan territorial sub-divisions of states to contract in or contract out of treaties independently of the mother country<sup>2</sup>. Incidentally, therefore, when self-governing dominions of the Crown eventually achieved statehood the question whether they succeeded to United Kingdom treaties did not arise, since they were already parties to them<sup>3</sup>. Similarly, when other British overseas territories were granted independence, the prime question in relation to treaties was often not whether those territories succeeded to the treaties, but whether those treaties already applied to them in their new international capacities by some territorial clause contained in them.

1 For examples of these, and as to the territorial application of treaties generally, see PARA 94.

2 This concession, as a matter of constitutional arrangement, of a degree of delegated authority to contract treaty rights and obligations contributed materially to the progress towards statehood of non-metropolitan British territories.

3 India, which was not then even wholly self-governing, was an original member of the United Nations and a party to the Charter of the United Nations in its own right.

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## **58. Absence of general succession.**

Apart from the matters discussed elsewhere in this title<sup>1</sup>, there is no general rule of international law to the effect that, upon a succession of states, the benefit or burden of the treaties of a predecessor state are, by reason of the succession, transferred to the successor state. On the contrary, if a state is extinguished its rights and obligations under such treaties are generally extinguished also. Similarly, although the effect of the creation of a new state out of the territory of an existing state may be to discharge the predecessor state from any obligation under a treaty and equally to deprive it of rights, the successor state cannot ordinarily claim the benefit, or be burdened by the obligations, of a treaty merely by reason of the succession. The rule is rather that a state succession does not of itself produce any succession in relation to treaty rights and obligations since, as regards the other states parties to the treaty, the new state is not a contracting party. A new state thus starts in principle with a clean slate<sup>2</sup>. However, the fact that a treaty is not in force in respect of a successor state does not impair the duty of a state to fulfil any obligation embodied in the treaty to which it would be subject at customary international law and independently of the treaty<sup>3</sup>.

<sup>1</sup> See PARAS 53 et seq, 59 et seq.

<sup>2</sup> The 'clean state' doctrine is implicit in many of the provisions of the Convention on Succession of States in respect of Treaties (Vienna, 22 August 1978; Misc 1 (1980); Cmnd 7760): see PARA 56 note 2. See also McNair's Law of Treaties 605. However, a bilateral treaty may be regarded as in force between the new state and another party if those states expressly so agree or by reason of their conduct they are to be considered as having so agreed: International Law Commission's Draft Articles of 1972, art 19, YILC 1972 vol II, 272. Thus, if a new state claims the benefit under a predecessor's treaty, it is precluded from denying that it succeeds to obligations under it.

<sup>3</sup> See the Vienna Convention on Succession of States in respect of Treaties art 5; and cf the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 43, which provides in the same terms for the case where a treaty is invalidated, terminated or suspended: see PARA 106 et seq.

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## 59. Dispositive treaties.

A treaty delimiting a boundary is binding in favour of and against a successor state<sup>1</sup>. Similarly, obligations and rights established by a treaty and relating to the regime of a boundary are not affected by a succession of states<sup>2</sup>. Further, a succession of states does not as such affect obligations or rights relating to the use of a particular territory or restrictions upon its use, established by a treaty specifically for the benefit of a foreign state and attaching to the territory in question<sup>3</sup>, or obligations or rights thus relating to a particular territory established by a treaty specifically for the benefit of a group of states or of all states<sup>4</sup>.

1 Convention on Succession of States in respect of Treaties (Vienna, 22 August 1978; Misc 1 (1980); Cmd 7760) art 11 para 1. A newly independent state is bound by the international boundaries and, if it is emerging by decolonisation, by the internal administrative frontiers of the predecessor colonial power as a matter of general international law: *Frontier Dispute (Burkina Faso/Republic of Mali)* ICJ Reports 1986, 554. The doctrine of uti possidetis which was evolved by the states which belonged to the former Spanish American Empire is, in part, to the same effect. In *Frontier Dispute (Burkina Faso/Republic of Mali)* which was between Burkina Faso and Mali, two states formerly part of French West Africa), rather than holding that uti possidetis was a principle of general application. However, in *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua intervening)* ICJ Reports 1992, 351 (which was between two Spanish-American states, El Salvador and Honduras), a chamber of the International Court of Justice treated uti possidetis simply as applying to former Spanish American colonies and accepted by the contending states; it did not enter into the question of its wider applicability. The principle of uti possidetis was relied upon by the Badinter Commission to determine the units of the former Yugoslavia entitled to self-determination and to establish their boundaries upon them becoming states, including reliance on internal administrative boundaries of the SFRY: see the Arbitration Commission of the European Conference on Yugoslavia (the 'Badinter Commission'), opinions 1, 3 (1992) 92 ILR 162, 170.

2 Vienna Convention on the Succession of States in respect of Treaties art 11 para 2. This would include such obligations as the obligation to proceed to demarcation of frontiers. The parties to *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* ICJ Reports 1962, 6 do not appear to have disputed this. Boundary disputes have arisen between newly independent states, but not with respect to the question of succession to boundary treaties as such.

3 Vienna Convention on the Succession of States in respect of Treaties art 12 para 1. See also *Free Zones of Upper Savoy and District of Gex Case* PCIJ Ser A No 24 (1930); further hearing PCIJ Ser A/B No 46 at 145 (1932).

4 Vienna Convention on the Succession of States in respect of Treaties art 12 para 2. See also the *Aaland Islands Case* LoNJ 1920 Supp No 3 at 16. This rule might apply to such treaties as those dealing with international canals (see PARA 99 note 7), or rights with respect to border rivers (see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 72).

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## **60. Multilateral treaties.**

With respect to multilateral treaties in force internationally in respect of territory which has become a new state, although that new state may have no direct rights and obligations under such a treaty as part of the treaty regime of its predecessor, it seems that it may have the right of option of becoming a party to the treaty itself if it so wishes<sup>1</sup>. Also, where a multilateral treaty is not yet in force, but the predecessor state has expressed its consent to be bound with reference to the territory in question, the same rule may apply<sup>2</sup>. However, the right of option is not open to the new state where this would be incompatible with the object and purpose of the treaty, nor where the parties to the treaty are limited in number, in which event the consent of all the parties is necessary to the new state becoming a party<sup>3</sup>.

1 See the Convention on Succession of States in respect of Treaties (Vienna, 22 August 1978; Misc 1 (1980); Cmnd 7760) art 17 para 1. This, according to the International Law Commission's Report on Succession of States in respect of Treaties (1978) reflects, inter alia, the practice of the Secretary-General of the United Nations with respect to multilateral treaties of which he is the depositary: see the International Law Commission's Draft Articles on Succession of States in respect of Treaties 1972 art 12, Commentary, para (3). The Draft Articles can be found in YILC 1972 vol II, 255.

2 See the Vienna Convention on the Succession of States in respect of Treaties art 18. As to the provisional application of multilateral treaties see art 27. As to treaties establishing an international organisation see art 4. With respect to ratification, acceptance or approval of a treaty signed by the predecessor state see art 19; and as to reservations to multilateral conventions see art 20.

3 See the International Law Commission's Draft Articles on Succession of States in respect of Treaties 1972 art 12 paras 2, 3, 13 paras 2, 3. An example of a treaty whose object and purpose would preclude a new state from the right of option to be a party is one which is geographically limited, or one which requires that the parties be members of a particular organisation, as is the case with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), the parties to which must be members of the Council of Europe. An example where the consent of existing parties is essential is the Treaty of European Union. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

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### **61. Human rights treaties.**

There appears to be an emerging principle, based on the objective nature of human rights obligations and the desirability of establishing that the people of an affected territory do not lose the protection which international human rights law affords them<sup>1</sup>, that successor states will be bound by the human rights treaty obligations of the predecessor states. Exceptionally, states may make specific agreements providing for the succession of human rights treaties following a change of sovereignty<sup>2</sup>.

1 See the Human Rights Committee, General Comment No 26 (A/53/40, Annex VII). For a slightly more nuanced view see I Oppenheim's International Law (9th Edn, 1992) p 222.

2 See eg the Joint Declaration of the Governments of the United Kingdom and the People's Republic of China on the Question of Hong Kong dated 19 December 1984, Annex I, Article XIII (TS 26 (1985); Cmnd 9543) providing for the continuance in force of the provisions of the International Covenant on Civil and Political Rights with respect to [the Special Administrative Region of] Hong Kong.

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## **62. Newly independent states and devolution agreements.**

In cases where a former colonial territory has become independent, several methods of avoiding the lapse of treaty rights and obligations upon independence have been resorted to<sup>1</sup>. New states have sometimes declared unilaterally that they regard themselves as parties to the treaties of their predecessors. Predecessors and successors have entered into agreements, commonly called devolution or inheritance treaties, purporting to indicate which treaties devolve upon succession and which do not<sup>2</sup>. As to the former, it is quite clear that such unilateral declarations are but *res inter alios acta* from the point of view of third states<sup>3</sup>. As to the latter, such agreements may serve as disclaimers of further responsibility on the part of predecessor states with respect to treaty obligations but will not of themselves discharge that responsibility; this will follow, if at all, rather from the moving treaty frontier rule<sup>4</sup>. Devolution agreements, however, are again *res inter alios acta* as respects third states and cannot invest successor states with any rights under treaties between those third states and predecessor states<sup>5</sup>.

1 Convention on Succession of States in respect of Treaties (Vienna, 22 August 1978; Misc 1 (1980); Cmnd 7760) arts 8, 9.

2 Devolution agreements were entered into by the United Kingdom with some, though not all, colonial territories, upon the latter attaining independence. This was done by means of exchanges of letters with eg Malaysia, 12 September 1957 (Cmnd 346); Ghana, 25 November 1957 (Cmnd 345); Nigeria, 1 October 1960 (Cmnd 1214); Sierra Leone, 5 May 1961 (Cmnd 1464); Jamaica, 7 August 1962 (Cmnd 1918); Trinidad and Tobago, 31 August 1962 (Cmnd 1919); Gambia, 20 June 1966 (Cmnd 3076); and in respect of India and Pakistan (see the Indian Independence (International Arrangements) Order 1947, 147 BFSP 158).

3 Nevertheless such declarations may constitute offers of novation which third states may accept and which they may be construed to have accepted tacitly if they act upon such offers.

4 As to the moving treaty frontier rule see PARA 56.

5 Devolution agreements may, however, serve the purpose ascribed to unilateral declarations: see note 3. There is also the possibility that treaties may be applied provisionally despite succession. However, customary international law appears to have no such rule to this effect.

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### **63. Concessionary contracts.**

Although practice prior to the 1939-45 war suggested that concessionary contracts which related to a particular area sovereignty over which was transferred to another state were binding upon the successor state, the weight of opinion is said now to be against this. The difference of opinion is perhaps immaterial since, if the rule was that there was a successor, it was qualified by the proposition that it was nevertheless competent to the new sovereign to terminate any concession subject to the payment of compensation<sup>1</sup>. And if the rule now is that there is no succession, the concessionaire is nevertheless entitled in theory to compensation when he is deprived of his rights under the concession by territorial transfer or otherwise.

<sup>1</sup> See *Mavrommatis Jerusalem Concessions* PCIJ Ser A No 5 (1925); *The Sopron-Koszeg Local Rly Co Case* 2 RIAA 961 (1929); *The Barcs-Pakrac Rly Co Case* (1934) 7 Ann Dig Case No 190. See also the Report of the Transvaal Concessions Committee 1901 (Cd 623) set up to advise the Colonial Office about concessions granted by the Boer Republics before their annexation in 1900. As to state responsibility in respect of concessions see PARA 474 note 9.

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#### **64. Other contractual rights.**

Although a bare claim to unliquidated damages appears not to be available against a successor state, the case may be different if there is in the claim some element of quasi-contract and both right and obligation may survive<sup>1</sup>. A contractual claim having the character of a vested or acquired right binds the successor state<sup>2</sup>.

1 *Lighthouses Arbitration* (1956) 23 Int LR 81 at 83 (claim no 11), at 91 (claim no 4), at 106 (claim no 12). As to claims for unliquidated damages in respect of delictual or tortious liability see *Robert E Brown Case* 6 RIAA 120 (1923); and PARA 65. As to the difficulties of classification involved see 1 O'Connell's International Law (2nd Edn) 387.

2 As to private rights and acquired rights see PARA 68; and as to concessionary contracts see PARA 63.



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#### **65. Claims in tort or delict.**

There is no succession in relation to obligations in respect of claims in tort or delict<sup>1</sup>. Where, however, a claim originating in tort or delict is liquidated, as by an arbitral or judicial decision, the rule may be otherwise<sup>2</sup>.

1 *Robert E Brown Case* 6 RIAA 120 (1923); *Hawaiian Claims Case* 6 RIAA 157 (1925). An English court has had occasion to advert to this rule: *West Rand Central Gold Mining Co Ltd v R* [1905] 2 KB 391, 2 BILC 283, DC.

2 The point is not clearly covered by authority, but see *Lighthouses Arbitration* (1956) 23 Int LR 659.

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## 66. Public property.

Upon a state succession the successor state succeeds to the public property of the predecessor<sup>1</sup>. In so far as it concerns immovable property within the territory transferred the proposition would appear to do little, if anything, more than reflect the fact that the successor state, in right of its sovereignty, may make what dispositions it wishes with respect to everything within its territorial jurisdiction. The same applies in relation to movables so situate<sup>2</sup>. For the most part the outgoing authorities leave behind them not only immovables, as they must, but also movables constituting public property, and relinquish all claim to assets of this character. But there may be exceptions, such as where the predecessor state seeks to retain a building as an embassy or the like. There may, too, be considerable difficulty in defining public property for the purpose, or the distinction between public and private property may be differently drawn in the laws of predecessor and successor state, or indeed may not exist at all in one or other of them. The matter has been the subject of often very detailed treaty regulation for centuries and has given rise to much litigation<sup>3</sup>. What rules of international law this considerable body of practice can be said to yield, however, is somewhat obscure<sup>4</sup>.

1 *Peter Pázmány University Case* PCIJ Ser A/B No 61 at 237 (1933). Rules respecting state succession in respect of public property and other matters were included in the Convention on Succession of States in respect of State Property, Archives and Debts (Vienna; 8 April 1983; 22 ILM (1983) 298). It has not yet entered into force. The United Kingdom has neither signed nor ratified this Convention. For an account of the Convention see 1 Oppenheim's International Law (9th Edn) pp 240-244.

2 Cf the position as to the nationality of individuals and private rights: see PARAS 68-69, 392.

3 When a predecessor state is totally absorbed, its successor may claim public assets situated extraterritorially; in English law this is only so after the conquest has been recognised de jure by the United Kingdom government: see *Haile Selassie v Cable and Wireless Ltd (No 2)* [1939] Ch 182, [1938] 3 All ER 677, 2 BILC 171, CA. As to recognition de facto and de jure see PARA 51.

4 The better view would seem to be that, property being an institution primarily of municipal rather than international law, it is unprofitable to look for some such rule as that public property automatically vests in the successor state: that must depend on the details of the relevant municipal system. In the Vienna Convention on Succession of States in respect of State Property, Archives and Debts 1983 'state property' is defined according to the law of the predecessor state (see art 8). Not all public property need be treated in the same way (see eg the treatment of cultural and military property in the succession states to the SFRY: *Agreement on Succession Issues Between the Five Successor States of the Former Yugoslavia* 41 ILM (2002) 3). On the other hand, it is arguable that there is a rule of international law of a negative sort to the effect that no claim will lie at the suit of a predecessor state if the successor takes steps to appropriate to itself public property. Approached in this way the real question involved may prove to be as to whether the predecessor state ever has any claim of this sort in respect of any species of property. If the answer here is that such a claim, as respects property within the transferred territory, immovable or movable, will lie only in respect of private property of an individual sovereign, then it becomes unnecessary to define public property for this purpose. For an attempt to use the English court in a succession issue to public monies, see *In AY Bank Limited (in liquidation) v Bosnia and Herzegovina* [2006] EWHC 830 (Ch), [2006] 2 All ER (Comm) 463.

There remains, however, the question as to the position if the predecessor state, in anticipation of the succession, alienates public property. There is some ground for the contention that, where such alienation is attended by circumstances akin to fraud, it ought to be disregarded. Cf *Civil Air Transport Inc v Central Air Transport Corpn* [1953] AC 70, [1952] 2 All ER 733, 7 BILC 523, PC.

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## 67. Public debts.

Although, for instance, a loan to a state from the International Bank for Reconstruction and Development or from some similar international agency, or from another state directly, may fall into a different category<sup>1</sup>, an international loan or international or public debt is commonly contracted according to municipal rather than international law<sup>2</sup>. Although the borrower is a state, the lenders are mostly private persons, and other states are indeed reluctant to exercise the right of protection on their behalf in case of default, the loan having been made in the way of business, which must involve the chance of loss as well as of profit<sup>3</sup>. The lenders' rights are primarily rights under municipal law, normally the law of the borrower state, and they are thus susceptible of change by whatever authority may make and change that law. In consequence, upon a state succession, the position in relation to public debts is not in principle different from that in relation to any other obligation under the law applicable within the territory transferred, and whether or not they survive is exclusively a matter for that law<sup>4</sup>. But though this may be the formal position, in practice provision has frequently been made by treaty for the partition of the public debt of the predecessor state and for the assumption of a proportion of it by the successor state<sup>5</sup>. It is to be doubted, however, whether any coherent principle is to be extracted from this practice<sup>6</sup>.

1 See Mann, *The Proper Law of Contracts Concluded by International Persons*, 35 BYIL (1959) 36 at 38.

2 As to the nature of a loan to a foreign government negotiated in England see *Smith v Weguelin* (1869) LR 8 Eq 198, 3 BILC 486; *Twycross v Dreyfus* (1877) 5 ChD 605, 3 BILC 513, CA. As to the nature of a loan contracted by the United Kingdom government upon a foreign market see *R v International Trustee for Protection of Bondholders AG* [1937] AC 500, [1937] 2 All ER 164, HL.

3 See 2 O'Connell's *International Law* (2nd Edn) 1080.

4 For a survey of the practice see 1 O'Connell's *State Succession in Municipal Law and International Law* 373-464. See also the *Ottoman Public Debt Arbitration* 1 RIAA 527 at 573 (1925); *Lighthouses Arbitration* (1956) 23 Int LR 659; *Verein für Schutzgebietenanleihen EV v Conradie NO* [1937] AD 113; and other cases summarised in the Digest of Decisions of National Courts etc YILC 1963 vol II, 95, 137-142, Part A VI (B). As to localised debts see the *Guano Case* 15 RIAA 77 at 330 (1901).

5 See 1 O'Connell's *State Succession in Municipal Law and International Law* 458-462. See also *West Rand Central Gold Mining Co Ltd v R* [1905] 2 KB 391 at 408, 2 BILC 283, DC, per Lord Alverstone CJ. See also the Convention on Succession of States in respect of State Property, Archives and Debts (Vienna; 8 April 1983; 22 ILM (1983) 298); and PARA 66 note 1.

6 It cannot be said, for instance, that, where the territory of a state is divided, the public debt must also be divided proportionately to the revenues of the several parts, or to their population; and although it is sometimes contended that an odious debt, such as a debt incurred to finance a conflict with the successor state, does not pass to that successor, such a proposition represents only a qualification put on a doubtful and imprecise general rule. According to the Badinter Commission, the general principle is that successor states should consult and reach an agreement on succession questions: see the Arbitration Commission of the European Conference on Yugoslavia (the 'Badinter Commission'), opinions 9, 14 (1992) 92 ILR 203, 96 ILR 729. It has been held that there is 'insufficient evidence to justify a conclusion that a rule as to succession to the property of a dismembered state (however sensible) (see the Vienna Convention on State Succession in respect of Property, Archives and Debts 1983, art 18(1)(b); and 66 note 1) has yet become a sufficiently general or consistent practice among states to qualify as customary international law for the purposes of recognition by English common law': see *Republic of Croatia v Republic of Serbia* [2009] EWHC 1559 (Ch), [2009] All ER (D) 30 (Jul) at [36], per Briggs J.

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## 68. Private rights.

Private rights acquired under existing law do not cease on a change of sovereignty<sup>1</sup>. It is, however, a question exclusively for the municipal legal system concerned whether or not private rights created or recognised by it cease upon a change of sovereignty or on any other event. The doctrine of the survival of acquired or vested rights which is claimed to be established as a rule of international law<sup>2</sup> is in any case qualified by the fact that the successor state may always, in the exercise of its legislative sovereignty, proceed to the abolition of such rights<sup>3</sup> unless inhibited either by treaty<sup>4</sup> or customary law<sup>5</sup>.

1 *German Settlers in Poland (Advisory Opinion)* PCIJ Ser B No 6, at 15, 36 (1923); *Certain German Interests in Polish Upper Silesia* PCIJ Ser A No 7 (1926); *Factory at Chorzów* PCIJ Ser A No 17 (1928). In the last two cases, the court was concerned with treaties but applied these with reference to the ordinary customary law.

2 See generally 1 O'Connell's *State Succession in Municipal Law and International Law* 237 at 269-297, where the practice is set out in great detail.

3 The doctrine of acquired rights, much favoured by American courts (see especially *United States v Percheman* 7 Pet 51 at 86 (USA 1830) per Marshall CJ) has received occasional indorsement in obiter judgments by English courts. See *West Rand Central Gold Mining Co Ltd v R* [1905] 2 KB 391 at 491, 2 BILC 283, DC, per Lord Alverstone CJ: 'As is said in more cases than one, cession of territory does not mean the confiscation of the property of individuals in that territory'. However, the operation of the doctrine is distorted in practice, if not substantively limited, by the doctrine of act of state, which disables the courts for inquiring into annexations of territory made, or cessions taken by the Crown: see *Cook v Sprigg* [1899] AC 572, 2 BILC 279, PC; *Secretary of State for India v Bai Rajbai* (1915) LR 42 Ind App 229, 2 BILC 631, PC; *Salaman v Secretary of State for India* [1906] 1 KB 613, 1 BILC 594, CA; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, PC; *Secretary of State for India v Sardar Rustam Khan* [1941] AC 356, [1941] 2 All ER 606, 1 BILC 626, PC; *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308, [1941] 2 All ER 93, 6 BILC 514, PC; *Oyekan v Adele* [1957] 2 All ER 785, [1957] 1 WLR 876, 7 BILC 572, PC. As to acts of state see PARA 22 et seq.

4 In *German Settlers in Poland (Advisory Opinion)* PCIJ Ser B No 6 at 15, 36 (1923), Poland was bound by the minorities provision contained in the Treaty of Peace with Poland (Versailles, 28 June 1919; TS 8 (1919); Cmd 223) art 7, to secure to all Polish nationals, including the German settlers, civilian rights (interpreted to include proprietary rights) without distinction. Hence the importance of the question whether any rights had been acquired before the territorial transfer and whether they survived that event.

5 Ie notably the duty not to expropriate the property of non-nationals arbitrarily and not for a public purpose: see PARA 473.

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## 69. Nationality.

The frequently repeated proposition that, upon a transfer of territory, at least if the inhabitants are resident or domiciled in the territory concerned, they lose the nationality of the predecessor state and acquire that of the successor state<sup>1</sup> is irreconcilable with the circumstance, for which there is now international judicial authority, that questions of nationality are primarily still questions of municipal rather than international law<sup>2</sup>. Who is or ceases to be a national of a particular state must depend exclusively on the law of that state. It was formerly the rule of English law that a person might become a British subject as a result of the annexation of territory with which he was connected, but precisely what connection was requisite was unclear<sup>3</sup>. It was also accepted that, at common law, upon a cession of territory by the Crown some circumscription of nationality took place<sup>4</sup>; but the details of the matter have been habitually regulated by treaty or proclamation.

1 See the numerous references to writers collected in 1 O'Connell's State Succession in Municipal Law and International Law 499 note 6.

2 *Tunis and Morocco Nationality Decrees Case (Advisory Opinion)* PCIJ Ser B No 4 (1923). See also the International Law Commission's Draft Articles of 1999, paras 47-48 (Nationality of Natural Persons in Relation to a Succession of States), A/54/10; and the Arbitration Commission of the European Conference on Yugoslavia (the 'Badinter Commission'), opinion 2 (1992) 92 ILR 167 at 168-169 (alluding to the possibility that individuals may have the nationality of their choice).

3 In *Calvin's Case* (1608) 7 Co Rep 1a at 5-7, 18, 4 BILC 133, Coke CJ was of the opinion that annexation of territory worked a species of 'denization' or naturalisation, and disagreed with the opinion of Bracton. In *Lyons Corp v East India Co* (1836) 1 Moo PCC 175 at 286, 2 BILC 483, PC, Lord Brougham interpreted the opinion of Sir Fletcher Norton, Attorney General, dated 27 July 1764 (see Forsyth's Cases and Opinions on Constitutional Law 253), on the status of inhabitants of Quebec to imply 'very distinctly, that the subjects of a conquered or ceded territory, are only to be considered as not being aliens, by virtue of the treaty which gives them the rights of subjects', and held this to be wholly untenable and contrary to authority. However, the opinion was not on the question of the effect of the cession on nationality but on the distinct question as to whether the English law against alien landholding applied in Quebec: *Donegani v Donegani* (1835) 3 Knapp 63 at 72, 2 BILC 470, PC. Furthermore, the matter was in that case regulated by treaty (Treaty of Peace between Great Britain, France and Spain (Paris, 10 February 1763; state Papers 108/123) art IV), and had commonly been so regulated since the Treaty of Peace and Friendship with France (Utrecht, 11 April 1713; state Papers 108/72), although the stipulation of that instrument (see art XIV) is elliptical, providing merely that such of the inhabitants as do not withdraw are to be free to practise the Roman Catholic religion. As to British practice in cases of acquisition of territory without treaty (ie annexation) see 5 British Digest 142-147; Parry's Nationality and Citizenship Laws of the Commonwealth (1st Edn, 1957) 431-435, 659-664.

4 *Re Stepney Election Petition, Isaacson v Durant* (1886) 17 QBD 54, 4 BILC 344, DC (dissolution of union of Crowns; a possibility canvassed but dismissed as 'less than a dream of a shadow, or a shadow of a dream' in *Calvin's Case* (1608) 7 Co Rep 1a at 27, 4 BILC 133). The decision in *Re Stepney Election Petition, Isaacson v Durant*, that the Hanoverians (which category was not sought to be defined) had ceased to be British subjects was based largely on the thesis that double nationality was an impossibility in law, which is misconceived. In *Doe d Thomas v Acklam* (1824) 2 B & C 779, 4 BILC 353, long after the event, the achievement of independence by the United States was held to have effected the expatriation of the inhabitants of the American colonies on a similar line of reasoning that dual status would be an 'inconvenience'. See also *Doe d Stansbury v Arkwright* (1833) 2 Ad & El 182n, 4 BILC 375; *Re Bruce* (1832) 2 Cr & J 436, 4 BILC 368; *Sutton v Sutton* (1830) 1 Russ & M 663, 4 BILC 362.

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## 70. Succession of governments.

Where one government succeeds another in the same state, the principle of continuity involves that rights and obligations under international law are unaffected in general<sup>1</sup>. This principle applies no less where the government to which there is a succession was unconstitutional<sup>2</sup>, or was suppressed in civil war<sup>3</sup>. The property acquired by one of the political factions in a civil war is attributed to the state and the assets of the defeated may be claimed by the victor, not by title paramount but subject to the liabilities of the defeated faction<sup>4</sup>. Where governmental property is in the United Kingdom at the time of the disappearance of the government it seems that, in the absence of its replacement by another, the property will be held on trust until a successor government is established<sup>5</sup>.

1 *Tinoco Arbitration* 1 RIAA 369 (1923). Thus, where two governments are in possession of parts of the territory of a state, each may commit the state as a whole at least with respect to ordinary governmental obligations: *Hopkins Case* 4 RIAA 41 (1926) (postal orders). As to state responsibility for acts of revolutionaries see PARA 349.

2 *Tinoco Arbitration* 1 RIAA 369 (1923); *Republic of Peru v Peruvian Guano Co* (1887) 36 ChD 489, 2 BILC 273; *Republic of Peru v Dreyfus Bros & Co* (1888) 38 ChD 348, 2 BILC 57; and see *Dolder v Bank of England* (1805) 10 Ves 352, 2 BILC 214; *King of the Two Sicilies v Willcox* (1851) 1 Sim NS 301, 2 BILC 230; *Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna v Boguslawski* [1953] AC 11, [1952] 2 All ER 470, 7 BILC 499, HL. Cf *Irish Free State v Guaranty Safe Deposit Co* 222 NYS 182 (1927); *Fogarty v O'Donaghue* [1926] 1 IR 531, 2 BILC 294.

3 *United States of America v McRae* (1867) 3 Ch App 79, 2 BILC 252; *Union of Soviet Socialist Republics v Onou* (1925) 69 Sol Jo 676, 2 BILC 134. As to the position where a territory is temporarily under belligerent occupation see *Gumbes' Case* (1834) 2 Knapp 369, 2 BILC 223.

4 *United States of America v McRae* (1867) 3 Ch App 79, 2 BILC 252; *United States of America v Prioleau* (1865) 2 Hem & M 559, 1 BILC 129.

5 *Republic of Somalia v Woodhouse, Drake and Carey (Suisse) SA, The Mary* [1993] QB 54, [1993] 1 All ER 371.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/71. Meaning of 'treaty'.

## 6. TREATIES AND INTERNATIONAL AGREEMENTS

### (1) ENTERING INTO TREATIES

#### 71. Meaning of 'treaty'.

The law of treaties is now generally governed by the Vienna Convention on the Law of Treaties<sup>1</sup>, which largely reflects customary international law<sup>2</sup>, and the following paragraphs are structured around the central provisions of that Convention<sup>3</sup>. For the purposes of the Convention, 'treaty' means an international agreement concluded between states<sup>4</sup> in written form<sup>5</sup> and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation<sup>6</sup>. Except in so far as it excludes agreements between states and international organisations<sup>7</sup>, this definition is consistent with United Kingdom law and practice, in which no distinction is made between a treaty expressly so called and an international agreement called by another name<sup>8</sup>, and in which an exchange of notes, letters or declarations, consisting of two or more documents, is familiar.

1 The Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964). The Convention entered into force on 27 January 1980. See generally I Oppenheim's International Law (9th Edn, 1992) Ch 14; Sinclair's The Vienna Convention on the Law of Treaties (2nd Edn, 1984); Aust *Modern Treaty Law and Practice* (2nd Edn, 2007); Shaw's International Law (6th Edn, 2008) Ch 16.

2 The Vienna Convention on the Law of Treaties does not have retroactive effect: see art 4. However, before it entered into force, the International Court of Justice referred to provisions of the Convention in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Request for Advisory Opinion)* ICJ Reports 1971, 359; *Fisheries Jurisdiction (United Kingdom v Iceland) (Jurisdiction of the Court)* ICJ Reports 1973, 3 at 14, 18, 19. Moreover, the International Court of Justice applied provisions of the Convention in interpreting a treaty of 1890, on the basis that they reflected customary international law: *Kasikili/Sedudu Island (Botswana/Namibia)* ICJ Reports 1999, 1045 at 1059 (para 18). See also *Arbitration Regarding the Iron Rhine Railway (Kingdom of Belgium/Kingdom of the Netherlands)*, Award of 24 May 2005, PCA at para 45; and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 38, 62. For an example of the English courts applying the Convention to a treaty concluded prior to the Convention entering into force, on the basis that art 31 of the Convention reflects customary international law, see *European Roma Rights Centre v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55, [2005] 2 AC 1, [2005] 1 All ER 527 (with respect to the 1951 Refugee Convention). As to the relation of the provisions of the Vienna Convention on the Law of Treaties to customary international law see Aust *Modern Treaty Law and Practice* (2nd Edn, 2007) 12-13.

3 See PARA 72 et seq.

4 As to capacity to enter into treaties see PARA 72. An individual or corporation cannot be a party to a treaty: *Anglo-Iranian Oil Co Case (United Kingdom v Iran) (Preliminary Objections)* ICJ Reports 1952, 93 (concession of 1933 between the company and the government of Persia held not to be a treaty, although the British government had taken part in its negotiation, which was conducted under the auspices of the League of Nations). By contrast, an individual or corporation may have directly enforceable rights under a treaty, for example, a right to bring proceedings under a human rights treaty or a right to arbitrate disputes under an applicable bilateral investment treaty.

5 The written agreement may be informal, for example agreed minutes of a meeting: see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility)* ICJ Reports 1995, 6. There appears to be no reason why an oral agreement should not be regarded as a treaty if it is made between states: see the 'Ihlen Declaration' by the Norwegian Foreign Minister

to the Danish Minister to Norway, which was held to be binding on Norway in the *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53 (1933). However, such an oral agreement would fall outside the scope of the Vienna Convention on the Law of Treaties (see art 2 para 1(a)), and there would also be difficulties as regards registration of such agreements. As to the registration of treaties see PARA 105.

6 Vienna Convention on the Law of Treaties art 2 para 1(a). As to the particular status of Memoranda of Understanding (MOUs) between states see Aust *Modern Treaty Law and Practice* (2nd Edn, 2007) Ch 3.

7 A treaty can be concluded between a state and another subject of international law, in particular an international organisation, or between international organisations: see PARA 517 et seq. The Vienna Convention on the Law of Treaties does not affect the legal force of such agreements: see art 3. Nor does the Convention affect the legal force of unilateral statements, as to which see PARA 110.

In 1986, the Convention on the Law of Treaties between States and International Organizations or between International Organizations was concluded in Vienna: see 25 ILM (1986) 543. The substantive provisions of the Convention are similar to those of the Vienna Convention on the Law of Treaties. The United Kingdom has ratified the Convention on the Law of Treaties between States and International Organisations or between International Organisations, but the Convention is not yet in force.

8 Eg Act, agreement, charter, concordat, constitution, convention, covenant, declaration, protocol or statute.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/72. Capacity to conclude treaties.

## **72. Capacity to conclude treaties.**

Every state possesses capacity to conclude treaties<sup>1</sup>. A treaty made between states may be expressed to be made by heads of state, or on behalf of the states, their governments or, less often, their ministries or state agencies<sup>2</sup>. In the United Kingdom the Crown has, historically, either directly or via the agency of a chartered company, such as the East India Company, entered into innumerable agreements, very often specifically styled 'treaties', with local powers in Asia, Africa and North America<sup>3</sup>, although the treaty character of such agreements, in the sense of an agreement governed by international law, has come to be denied<sup>4</sup>. The power to make treaties remains with the Crown notwithstanding the devolution of certain legislative and executive powers to Scotland, Northern Ireland and Wales<sup>5</sup>. On rare occasions, the Crown has entered into agreements with constituent elements of a federal state<sup>6</sup>.

International organisations, such as the United Nations, have capacity to conclude such treaties as are within their express or implied powers<sup>7</sup>.

1 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 6. 'State' is not defined in the Convention. As to treaty-making power in the United Kingdom see PARA 17 et seq. As to the meaning of 'treaty' see PARA 71.

2 As to representation see PARA 73 et seq.

3 See generally Parry and Hopkins's Index of British Treaties 1101-1968, especially under 'Indian States', 'Malay States'.

4 As to the development of the doctrine of paramountcy and other doctrines to the effect that the Crown's relations with the Princely States were matters of constitutional rather than international law see Panikkar's Relations of Indian States with the Government of India; Lee-Warner The Native States of India; Report of the Indian States Committee (Cmd 3302) (1929).

5 See eg, in respect of Scotland, matters reserved to the Crown pursuant to the Scotland Act 1998 s 30, Sch 5 para 7. The observation and implementation of international obligations is not however a reserved matter.

6 See the Swiss Declaration (Cantons of Valais and Bâle Town) and British Counter-Declaration relative to the Duty on Withdrawal of Private Property (Zürich and London, 31 July 1840; 39 BFSP 1315); Swiss Declaration (Cantons of Soleure and St Gall) and British Counter-Declaration relative to the Duty on Withdrawal of Private Property (Berne and London, 27 January 1841; 39 BFSP 1316).

7 For examples of treaties between the United Kingdom and international organisations see the Headquarters Agreements referred to in PARA 308. As to the capacity of international organisations to conclude treaties see *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* ICJ Reports 1949, 174.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/73. Representation; full powers.

### **73. Representation; full powers.**

A person is considered as representing a state for the purpose of adopting or authenticating the text of a treaty<sup>1</sup> or for the purpose of expressing the consent of the state to be bound by a treaty, if: (1) he produces appropriate full powers<sup>2</sup>; or (2) it appears from the practice of the states concerned or from other circumstances that their intention was to consider that person as representing the state for such purposes and to dispense with full powers<sup>3</sup>.

As to the meaning of 'treaty' see PARA 71.

Full powers means a document emanating from the competent authority of a state designating a person or persons to represent the state for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the state to be bound by a treaty, or for accomplishing any other act with respect to a treaty: Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 2 para 1(c). The production of full powers is the fundamental safeguard for the representatives of the states concerned of each other's qualifications to represent their states for the purposes of performing the particular act in question: see the final draft of the International Law Commission's Commentary, YILC 1996 vol II, 193.

<sup>3</sup> Vienna Convention on the Law of Treaties art 7 para 1. An act relating to the conclusion of a treaty performed by a person who cannot be considered under art 7 as authorised to represent a state for that purpose is without legal effect unless afterwards confirmed by that state: see art 8.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/74. Absence of requirement of full powers.

#### **74. Absence of requirement of full powers.**

In virtue of their functions and without having to produce full powers<sup>1</sup>, the following are considered as representing their state: (1) heads of state, heads of government and ministers for foreign affairs, for the purpose of performing all acts relating to the conclusion of a treaty<sup>2</sup>; (2) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited<sup>3</sup>; (3) representatives accredited by states to an international conference or to an international organisation or one of its organs, for the purpose of adopting the text of a treaty in that conference, organisation or organ<sup>4</sup>.

The Sovereign, in whom by both international law and the law of the United Kingdom the right of representation resides, may presumably enter into a treaty in person and without any form of authority although it does not appear that the Sovereign has done so since at least the Restoration<sup>5</sup>. The United Kingdom has three types of full power: (a) the Queen's general full powers, which are signed by Her Majesty and empower the Secretary of State for Foreign and Commonwealth Affairs, Ministers of State and Under Secretaries of State to sign any treaty, and the United Kingdom Permanent Representatives to the United Nations and European Union to sign treaties in their respective fields; (b) the Queen's special full powers which are issued for the signing of a specific treaty drawn up between heads of state; and (c) the governmental full powers, which are issued for the signing of specific intergovernmental and interstate treaties<sup>6</sup>.

1 As to the meaning of 'full powers' see PARA 73.

2 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 7 para 2(a). An act relating to the conclusion of a treaty performed by a person who cannot be considered under art 7 as authorised to represent a state for that purpose is without legal effect unless afterwards confirmed by that state: see art 8. As to the meaning of 'treaty' see PARA 71.

3 Vienna Convention on the Law of Treaties art 7 para 2(b). See also note 2.

4 Vienna Convention on the Law of Treaties art 7 para 2(c). See also note 2.

5 Even royal marriage treaties, which were more in the nature of family compacts than agreements governed by international law, were not concluded by the Crown in person: Royal Marriage Treaties 1772-1885, Foreign Office Library, 1020 (FO) (partly in manuscript). 'The Honourable Woodrow Wilson, President of the United States, acting in his own name and by his own perfect authority', signed the Treaty of Peace with Germany (Treaty of Versailles) (Versailles, 28 June 1919; TS 4 (1919); Cmd 153).

6 306 HC Official Report (6th series), 11 February 1998, written answers, col 247. See 69 BYIL (1998) 447.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/75. Adoption and authentication of the text of a treaty.

## **75. Adoption and authentication of the text of a treaty.**

The adoption of the text of a treaty<sup>1</sup> takes place by the consent of all the states participating in its drawing up<sup>2</sup>. However, according to the Vienna Convention on the Law of Treaties, the adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the states present and voting unless by the same majority they decide to apply a different rule<sup>3</sup>.

Authentication of a treaty, that is the establishment of its text as authentic and definitive, is effected by such procedure as may be provided for in the text or agreed upon by the states participating in its drawing up<sup>4</sup>; or, failing such procedure, by the signature, signature ad referendum or initialling by the representatives of the states of the text of the treaty or of the final act of a conference incorporating the text<sup>5</sup>. Some other means of authentication may, however, be substituted, for example by incorporation in a resolution of an international organisation<sup>6</sup>, or, as in the case of conventions concluded under the auspices of the International Labour Organisation, by two persons only, the President of the International Labour Conference at which the convention is adopted and the Director General of the International Labour Office<sup>7</sup>.

In the practice of the United Kingdom, a representative has to be furnished with full powers<sup>8</sup> in order to sign a treaty even for the limited purpose of its authentication<sup>9</sup>.

1    le the formal act by which the final form and content of the treaty are settled. As to the meaning of 'treaty' see PARA 71.

2    Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 9 para 1.

3    Vienna Convention on the Law of Treaties art 9 para 2. In practice, attempts will often be made to reach an agreement on a text by consensus, so, for example, the Third United Nations Conference on the Law of the Sea (1972-1983) proceeded on the basis that 'the Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted': see the Informal Composite Negotiating Text art 153 para 4 (A/CONF.62/WP.10).

4    Vienna Convention on the Law of Treaties art 10(a).

5    Vienna Convention on the Law of Treaties art 10(b).

6    The Vienna Convention on the Law of Treaties applies to any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation: see art 5.

7    As to authentication of the International Labour Organisation Conventions see the Constitution of the International Labour Organisation (Montreal, 9 September 1946; TS 47 (1948); Cmd 7452) art 19 para 4. As to the International Labour Organisation see PARA 533. Copies of the conventions may be obtained from the Publications Bureau, International Labour Office, 4 rue des Morillons, CH-1211 Geneva 22, Switzerland; or on the website of the International Labour Organisation, accessible on the date at which this title states the law at [www.ilo.org](http://www.ilo.org).

8    As to the meaning of 'full powers' see PARA 73.

9    7 British Digest 591, citing Jones's Full Powers and Ratification 38.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/76. Expressing consent to be bound.

## **76. Expressing consent to be bound.**

The consent of a state to be bound by a treaty<sup>1</sup> may be expressed by signature<sup>2</sup>, exchange of instruments<sup>3</sup> constituting a treaty, ratification<sup>4</sup>, acceptance, approval or accession<sup>5</sup>, or by any other means if so agreed<sup>6</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 As to signature see PARA 77.

3 As to the exchange of instruments see PARA 78.

4 As to ratification see PARA 79.

5 As to accession see PARA 80.

6 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 11. The consent of a state to be bound by part of a treaty is (without prejudice to the issue of reservations to treaties (see PARA 83)) effective only if the treaty so permits or the other contracting states so agree; and the consent of a state to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates: see art 17.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/77. Signature.

## 77. Signature.

Signature of the text of a treaty<sup>1</sup> has traditionally served a more significant purpose than mere authentication<sup>2</sup>, as it constituted the first part of the dual process of signature and ratification, whereby a state becomes bound by the treaty. At one time subsequent ratification was formally necessary as a matter of English law to the effectiveness of a signature for this purpose<sup>3</sup>. The modern rule is that the consent of a state to be bound by a treaty is expressed by the signature of its representative<sup>4</sup> when (1) the treaty provides that signature has that effect<sup>5</sup>; (2) it is otherwise established that the negotiating states<sup>6</sup> were agreed that signature should have that effect<sup>7</sup>; or (3) the intention of the state to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation<sup>8</sup>. Although it is not clear whether, in the absence of any evidence of this kind, the residuary rule is that ratification is unnecessary or necessary in order that the parties may be bound by a treaty, the question has little practical importance as treaties generally do contain express wording on this matter<sup>9</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 As to authentication see PARA 75.

3 *The Eliza Ann* (1813) 1 Dods 244, 6 BILC 345.

4 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 12. For these purposes the initialling of a text constitutes a signature of the treaty when it is established that the negotiating states so agreed, and the signature ad referendum of a treaty by a representative, if confirmed by this state, constitutes a full signature of the treaty: art 12 para 2.

5 Vienna Convention on the Law of Treaties art 12 para 1(a).

6 'Negotiating state' means a state which took part in the drawing up and adoption of the text of the treaty: Vienna Convention on the Law of Treaties art 2 para 1(e).

7 Vienna Convention on the Law of Treaties art 12 para 1(b).

8 Vienna Convention on the Law of Treaties art 12 para 1(c).

9 See Sinclair's *The Vienna Convention on the Law of Treaties* (2nd Edn, 1984) 39-41; and Aust *Modern Treaty Law and Practice* (2nd Edn, 2007) 96-97 (expressing the view that the issue is of no practical importance today as it has long been the practice of states, when they intend a treaty to enter into force by a procedure involving more than just signature, to provide evidence of that intention, usually by an express provision in the treaty).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/78. Exchange of instruments.

## **78. Exchange of instruments.**

The consent of states to be bound by a treaty<sup>1</sup> constituted by instruments exchanged between them is expressed by that exchange when: (1) the instruments provide that their exchange has that effect<sup>2</sup>; or (2) it is otherwise established that those states were agreed that the exchange of instruments should have that effect<sup>3</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 13(a).

3 Vienna Convention on the Law of Treaties art 13(b).

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## 79. Ratification, acceptance or approval.

The consent of a state to be bound by a treaty<sup>1</sup> is expressed by ratification when: (1) the treaty provides for such consent to be expressed by means of ratification<sup>2</sup>; (2) it is otherwise established that the negotiating states<sup>3</sup> were agreed that ratification should be required<sup>4</sup>; (3) the representative of the state has signed the treaty subject to ratification<sup>5</sup>; or (4) the intention of the state to sign the treaty subject to ratification appears from the full powers<sup>6</sup> of its representative or was expressed during the negotiation<sup>7</sup>. A state's consent to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification<sup>8</sup>. Where ratification or the like is required, it is commonly effected by the United Kingdom in the form of an instrument under the Great Seal, but may exceptionally be under a signature of the Secretary of State for Foreign and Commonwealth Affairs<sup>9</sup>. Ratification does not generally have a retroactive effect<sup>10</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969: TS 58 (1980); Cmnd 7964) art 14 para 1(a).

3 As to the meaning of 'negotiating state' see PARA 77 note 6.

4 Vienna Convention on the Law of Treaties art 14 para 1(b).

5 Vienna Convention on the Law of Treaties art 14 para 1(c).

6 As to the meaning of 'full powers' see PARA 73.

7 Vienna Convention on the Law of Treaties art 14 para 1(d). As to the question whether ratification is called for when it is not provided for in any of these ways see PARA 77. In the United Kingdom it is the Crown who authorises signature and effects ratification. It should be remembered that ratification (as with acceptance, approval and accession) is an international act whereby a state establishes on the international plane its consent to be bound by a treaty, generally by deposit of an instrument of ratification, to be distinguished from domestic processes that may be required in order to effect ratification.

8 Vienna Convention on the Law of Treaties art 14 para 2. These methods of expressing consent to be bound are increasingly used in modern practice in order chiefly to avoid complication which may arise from the provisions of constitutions of countries such as the United States of America which, while admitting to the making of what are termed executive agreements, which entail the expression of consent to be bound being expressed in an informal fashion, prescribe a formal and often laborious procedure for ratification of treaties expressly so called.

9 For an example of an instrument of ratification in the simplified wording now used see Aust *Modern Treaty Law and Practice* (2nd Edn, 2007) App L. As to the use of the Great Seal see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 909. As to exchange or deposit of instruments of ratification, acceptance, approval or accession see Vienna Convention on the Law of Treaties art 16.

10 As to the date of entry into force of a treaty see Vienna Convention on the Law of Treaties art 24; and PARA 89. The issue of whether a treaty has yet been ratified may be of critical importance in both international and domestic claims. See *Iloilo Claims* 6 RIAA 158 (1925). See also *The Eliza Ann* (1813) 1 Dods 244, 6 BILC 345; *Kotzias v Tyser* [1920] 2 KB 69, 6 BILC 348; *Lloyd v Bowring* (1920) 36 TLR 397, 6 BILC 354. See further *Philippson v Imperial Airways Ltd* [1939] AC 332.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/80. Accession.

## **80. Accession.**

Where a treaty<sup>1</sup> is already in force between two or more states, another state which wishes to become a party to it may do so by accession. The position is the same when, in the case of a multilateral treaty, a state which has participated in the drawing up of the treaty, but has not signed it before the expiry of the period for signature, wishes to become a party to it. Its consent to be bound by a treaty is expressed by accession when: (1) the treaty provides that such consent may be expressed by that state by means of accession<sup>2</sup>; (2) it is otherwise established that the negotiating states<sup>3</sup> were agreed that such consent may be expressed by that state by means of accession<sup>4</sup>; or (3) all the parties have subsequently agreed that such consent may be expressed by that state by means of accession<sup>5</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 15(a).

3 As to the meaning of 'negotiating state' see PARA 77 note 6.

4 Vienna Convention on the Law of Treaties art 15(b).

5 Vienna Convention on the Law of Treaties art 15(c). There is no need for a third state to participate in any process of adoption or authentication of the text, nor for any time to be required by it in which to consider the impact of the treaty upon its relations generally or to amend its laws consistent with the treaty, since this may be done before its accession to the treaty.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/81. Variations on traditional methods of treaty-making.

### **81. Variations on traditional methods of treaty-making.**

It has become relatively common to adopt variants upon the traditional treaty-making<sup>1</sup> methods of signature<sup>2</sup>, signature followed by ratification<sup>3</sup> and accession<sup>4</sup>, for the purpose of simplifying or accelerating matters. Thus a text adopted by a conference and authenticated<sup>5</sup> by some simplified device may be 'opened for signature' for all parties, either indefinitely or for a certain time, after which fresh parties will be acceding rather than signatory parties. With the adoption of such variations, signature, ratification and accession tend to become indistinguishable<sup>6</sup>.

In this context it is to be observed also that any attempt to categorise the means whereby a state may become party to a treaty can be a source of confusion. The Charter of the United Nations<sup>7</sup>, for instance, provides that states other than the original members seeking admission must 'accept the obligations contained in' that instrument, and their admission is subject inter alia to a vote of two-thirds of the members of the United Nations General Assembly present and voting upon a recommendation of the Security Council<sup>8</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 As to signature see PARA 77.

3 As to ratification see PARA 79.

4 As to accession see PARA 80.

5 As to adoption and authentication see PARA 75.

6 In this respect, the consent of a state to be bound by a treaty may be expressed inter alia by any other means if so agreed: see the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmd 7964) art 11; and PARA 76.

7 In the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015).

8 See the Charter of the United Nations arts 4 para 1, 18 para 2; and PARAS 520, 527.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/82. Obligation not to defeat the object and purpose of a treaty prior to its entry into force.

**82. Obligation not to defeat the object and purpose of a treaty prior to its entry into force.**

A state is obliged to refrain from acts which would defeat the object and purpose of a treaty<sup>1</sup> when (1) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval<sup>2</sup>, until it has made its intention clear not to become a party to the treaty<sup>3</sup>; or (2) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed<sup>4</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 As to ratification, acceptance or approval see PARA 79.

3 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 18(1).

4 Vienna Convention on the Law of Treaties art 18(2). See also Aust *Modern Treaty Law and Practice* (2nd Edn, 2007) 116-119.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/83. Reservations.

### 83. Reservations.

A reservation is a unilateral statement, however phrased or named, made by a state when signing<sup>1</sup>, ratifying, accepting, approving<sup>2</sup> or acceding<sup>3</sup> to a treaty<sup>4</sup>, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state<sup>5</sup>. The subject matter of a reservation is commonly a restriction of the obligations of the state making it, but exceptionally it may be a mere variation or even a purported undertaking of something more than the treaty text requires<sup>6</sup>. Where a bilateral treaty is concerned, a reservation is simply the proposal of an amendment of the treaty text. The legality of reservations is only a separate legal issue in the case of multilateral treaties.

1 As to signature see PARA 77.

2 As to ratification, acceptance and approval see PARA 79.

3 As to accession see PARA 80.

4 As to the meaning of 'treaty' see PARA 71.

5 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 2 para 1(d). As to the effect of a reservation that was permissible under the relevant treaty and to which no objection had been taken by the other state concerned see *Legality of Use of Force (Yugoslavia v United States of America) (Provisional Measures)* ICJ Reports 1999, 916 at 924 (where the International Court of Justice found that the reservation had the effect of excluding the relevant provision so far as the two parties were concerned). It is necessary to distinguish between a true reservation and an interpretative declaration, which does not have this effect. For a further distinction between a 'mere' interpretative declaration and a 'qualified interpretative declaration' by which a state seeks to make its acceptance of a treaty provision depend upon acceptance by other states of its interpretation thereof and which is therefore assimilable to a true reservation see *Belilos v Switzerland* (1988) 10 EHRR 446, ECtHR. As to consideration of the effect of an interpretative declaration by the English courts see *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2006] UKHL 26, [2007] 1 AC 270, [2007] 1 All ER 113.

6 See generally I Oppenheim's International Law (9th Edn, 1992) 1240-1248, Shaw's International Law (6th Edn) 913-925; and Aust *Modern Treaty Law and Practice* (2nd Edn, 2007) Ch 8. See also the work of the International Law Commission on Reservations to Treaties including the reports of the Special Rapporteur and the ILC Draft Guidelines which was available at the date at which this volume states the law on [www.untreaty.un.org/ilc](http://www.untreaty.un.org/ilc).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/84. Formulation of reservations.

#### **84. Formulation of reservations.**

A state may, when signing<sup>1</sup>, ratifying, accepting, approving<sup>2</sup> or acceding<sup>3</sup> to a treaty<sup>4</sup>, formulate a reservation<sup>5</sup> unless: (1) the reservation is prohibited by the treaty<sup>6</sup>; (2) the treaty provides that only specified reservations, which do not include the reservation in question, may be made<sup>7</sup>; or (3) in cases not falling under heads (1) or (2) the reservation is incompatible with the object and purpose of the treaty<sup>8</sup>.

1 As to signature see PARA 77.

2 As to ratification, acceptance and approval see PARA 79.

3 As to accession see PARA 80.

4 As to the meaning of 'treaty' see PARA 71.

5 As to the meaning of 'reservation' see PARA 83. Although this is not expressly stated in the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964), the regime of reservations is concerned with multilateral as opposed to bilateral treaties: a reservation by one party to a proposed term of the bilateral treaty would necessitate a re-negotiation. The United Kingdom adheres to the view that for a state to seek to attach a reservation to a bilateral treaty as a condition of acceptance of that treaty is in effect to refuse acceptance of the treaty as drafted, and to require a reopening of the negotiations: see (1997) 68 BYIL 482.

6 Vienna Convention on the Law of Treaties art 19(a). See also *Belilos v Switzerland* (1988) 10 EHRR 446, ECtHR. For an example of such a prohibition see the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999) art 120.

7 Vienna Convention on the Law of Treaties art 19(b). For an example of such a provision see the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 309; and the Convention on the Continental Shelf (Geneva, 29 April 1958; TS 39 (1964); Cmnd 2422) art 12 para 1.

8 Vienna Convention on the Law of Treaties art 19(c). See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* ICJ Reports 1951, 15. Where the treaty itself permits reservations, these are, of course, allowed: *Arbitration between the United Kingdom and France on the Delimitation of the Continental Shelf* (Misc 15 (1978); Cmnd 7438); 18 RIAA 3 (1978).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/85. Acceptance of and objections to reservations.

## **85. Acceptance of and objections to reservations.**

A reservation<sup>1</sup> which is expressly authorised by a treaty<sup>2</sup> does not require any subsequent acceptance<sup>3</sup> by the other contracting states unless the treaty so provides<sup>4</sup>. When it appears from the limited number of negotiating states<sup>5</sup> and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties<sup>6</sup>. When a treaty is a constituent instrument of an international organisation, then, unless otherwise provided, a reservation requires the acceptance of the competent organ of that organisation<sup>7</sup>.

In cases not falling under any of the conditions noted above, and unless the treaty otherwise provides, (1) acceptance by another contracting state of a reservation constitutes the reserving state a party to the treaty in relation to that other state if or when the treaty is in force for those states<sup>8</sup>; (2) an objection by another state to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving states unless a contrary intention is definitely expressed by the objecting state<sup>9</sup>; and (3) an act expressing a state's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting state has accepted the reservation<sup>10</sup>.

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a state if it has raised no objection to the reservation by the end of a period of 12 months after it was notified of it, or by the date on which it expressed its consent to be bound by the treaty, whichever is later<sup>11</sup>.

1 As to the meaning of 'reservation' see PARA 83.

2 As to the meaning of 'treaty' see PARA 71.

3 As to acceptance see PARA 79.

4 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 20 para 1.

5 As to the meaning of 'negotiating state' see PARA 77 note 6.

6 Vienna Convention on the Law of Treaties art 20 para 2. A reservation must be formulated in writing and communicated to the other contracting states and other states entitled to become parties to the treaty; art 23 para 1; and see PARA 88. As to when a reservation is deemed to have been accepted see art 20 para 5; and the text to note 11.

7 Vienna Convention on the Law of Treaties art 20 para 3.

8 Vienna Convention on the Law of Treaties art 20 para 4(a).

9 Vienna Convention on the Law of Treaties art 20 para 4(b).

10 Vienna Convention on the Law of Treaties art 20 para 4(c). As to the legal effect of a reservation or an objection to it see art 21; and PARA 86. As to the communication of acceptances of and objections to reservations see art 23; and PARA 88.

11 Vienna Convention on the Law of Treaties art 20 para 5. It follows from art 20 para 4(b) (see the text to note 9) that the onus is on the objecting state to express its objection and, if it wishes to preclude the entry into force of the treaty as between itself and the reserving state, it must make this express.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/86. Legal effect of reservations and objections.

## **86. Legal effect of reservations and objections.**

A reservation<sup>1</sup> established with regard to another party to a treaty<sup>2</sup> modifies for the reserving state in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation, and modifies those provisions to the same extent for that other party in its relations with the reserving state<sup>3</sup>. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*<sup>4</sup>. When a state objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving state, the provisions to which the reservation relates do not apply as between the two states to the extent of the reservation<sup>5</sup>.

1 As to the meaning of 'reservation' see PARA 83.

2 As to the meaning of 'treaty' see PARA 71.

3 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 21 para 1. A reservation therefore operates reciprocally where possible. For example, if in respect of a treaty providing for the waiver of port dues in favour of state-owned vessels, state X makes a reservation in relation to vessels employed in commerce, Y may levy dues on vessels of X of the category described in ports of Y, just as X may do on Y's vessels in X's ports; but if the reservation is 'except in the port of N, the capital city of X', this is obviously not capable of reciprocal application. It would appear that in order for a reservation to have legal effect as provided for in art 21, the procedural requirements of art 23 must be met: see PARA 88.

4 Vienna Convention on the Law of Treaties art 21 para 2.

5 Vienna Convention on the Law of Treaties art 21 para 3. In some cases (as in the example given in note 3) this rule must operate to render the reservation as effective as if it had been accepted. General international law will fill the gap created by the reservation and objection thereto: *Arbitration between the United Kingdom and France on the Delimitation of the Continental Shelf* (Misc 15 (1978); Cmnd 7438); 18 RIAA 3 (1978). As to the various unresolved issues in relation to the effect of an impermissible reservation, and also reservations to human rights treaties, see Shaw's *International Law* (6th Edn, 2008) 921-924, Aust *Modern Treaty Law and Practice* (2nd Edn, 2007) 144-151, and the draft guidelines adopted by the International Law Commission in the course of its work on reservations to treaties which were available at the date at which this volume states the law at [www.untreaty.un.org/ilc](http://www.untreaty.un.org/ilc).



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/87. Withdrawal of reservations and objections.

**87. Withdrawal of reservations and objections.**

Unless the treaty<sup>1</sup> otherwise provides:

- 15 (1) a reservation<sup>2</sup> may be withdrawn at any time and the consent of a state which has accepted the reservation is not required for its withdrawal<sup>3</sup>;
- 16 (2) an objection to a reservation may be withdrawn at any time<sup>4</sup>

Unless the treaty otherwise provides, or unless it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to another contracting state only when notice of it has been received by that state, and the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the state which formulated the reservation<sup>5</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 As to the meaning of 'reservation' see PARA 83.

3 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 22 para 1.

4 Vienna Convention on the Law of Treaties art 22 para 2.

5 Vienna Convention on the Law of Treaties art 22 para 3.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(1) ENTERING INTO TREATIES/88. Procedure regarding reservations.

## **88. Procedure regarding reservations.**

A reservation<sup>1</sup>, an express acceptance of a reservation and an objection to a reservation, must be formulated in writing and communicated to the contracting states and other states entitled to become parties to the treaty<sup>2</sup>. If formulated when signing<sup>3</sup> the treaty subject to ratification, acceptance or approval<sup>4</sup>, a reservation must be formally confirmed by the reserving state when expressing its consent to be bound<sup>5</sup> by the treaty<sup>6</sup>. In such a case the reservation is considered as having been made on the date of its confirmation<sup>7</sup>. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation<sup>8</sup>. Finally the withdrawal of a reservation or of an objection to it must be formulated in writing<sup>9</sup>.

1 As to the meaning of 'reservation' see PARA 83.

2 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 23 para 1. As to the legal effects of a reservation see PARA 86. It would appear to follow that, in order for a reservation to have legal effect as provided for in art 21, the procedural requirements of art 23 must be met. As to the expression of consent to be bound by a treaty see PARA 76. As to the meaning of 'treaty' see PARA 71.

3 As to signature see PARA 77.

4 As to ratification, acceptance and approval see PARA 79.

5 As to consent to be bound see PARA 76.

6 Vienna Convention on the Law of Treaties art 23 para 2.

7 Vienna Convention on the Law of Treaties art 23 para 2.

8 Vienna Convention on the Law of Treaties art 23 para 3.

9 Vienna Convention on the Law of Treaties art 23 para 4.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(2) APPLICATION OF TREATIES/89. Entry into force.

## **(2) APPLICATION OF TREATIES**

### **89. Entry into force.**

A treaty<sup>1</sup> enters into force in such manner and upon such date as it may provide or as the negotiating states<sup>2</sup> may agree<sup>3</sup>. Failing such provision or agreement, a treaty enters into force as soon as consent to be bound<sup>4</sup> by it has been established for all the negotiating states<sup>5</sup>. When the consent of a state to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that state on that date, unless the treaty otherwise provides<sup>6</sup>. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of states to be bound by the treaty, the manner or date of its entry into force, reservations<sup>7</sup>, the functions of the depositary<sup>8</sup> and other matters arising necessarily before the entry into force of the treaty, apply from the time of the adoption of its text<sup>9</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 As to the meaning of 'negotiating state' see PARA 77 note 6.

3 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 24 para 1. See McNair's Law of Treaties 191-205; and Aust *Modern Treaty Law and Practice* (2nd Edn, 2007) 163-177. In the case of modern multilateral treaties it is a frequent practice for the treaty itself to provide that it is to enter into force upon the expiration of a certain period of time after a given number of instruments of ratification or accession have been deposited. For example, the Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986; Misc 11 (1987); Cm 244; (1986) ILM 543) art 85 para 1 provides that the Convention is to enter into force on the thirtieth day following the date of deposit of the 35th instrument of ratification or accession with the Secretary-General of the United Nations. More exceptionally, entry into force may be dependent on ratification of certain identified states: see the Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, 1 July 1968; TS 88 (1970); Cmnd 4474).

4 As to consent to be bound see PARA 76.

5 Vienna Convention on the Law of Treaties art 24 para 2.

6 Vienna Convention on the Law of Treaties art 24 para 3. This applies to states which accede to a treaty. As to accession see PARA 80.

7 As to the meaning of 'reservation' see PARA 83.

8 As to depositaries see PARA 104.

9 Vienna Convention on the Law of Treaties art 24 para 4. Although these provisions apply, it is difficult to see that they impose any binding obligation. As to adoption see PARA 75.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(2) APPLICATION OF TREATIES/90. Provisional application of treaties.

## **90. Provisional application of treaties.**

A treaty<sup>1</sup> or part of it may be applied provisionally pending its entry into force, if the treaty itself so provides or if the negotiating states<sup>2</sup> have in some other manner so agreed<sup>3</sup>. Unless the treaty otherwise provides or the negotiating states have otherwise agreed, the provisional application of a treaty or part of a treaty with respect to a state is terminated if that state notifies the other states between which the treaty is being applied provisionally of its intention not to become a party to the treaty<sup>4</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 As to the meaning of 'negotiating state' see PARA 77 note 6.

3 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 25 para 1. By way of practical example, pursuant to the Energy Charter Treaty (Lisbon, December 1994) art 45 (Annex 1 to the Final Act of the European Energy Charter Conference), each signatory agrees to apply the treaty provisionally pending its entry into force for such signatory (to the extent that such provisional application is not inconsistent with its constitution, laws or regulations). The Russian Federation was a signatory but, on 20 August 2009, officially informed the depositary that it did not intend to become a contracting party to the treaty. In accordance with art 45 para 3(a), such notification resulted in Russia's termination of its provisional application of the treaty upon expiration of 60 calendar days.

4 Vienna Convention on the Law of Treaties art 25 para 2.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(2) APPLICATION OF TREATIES/91. Performance.

## 91. Performance.

Every treaty<sup>1</sup> in force is binding upon the parties to it and must be performed by them in good faith<sup>2</sup>. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty<sup>3</sup>. The obligation under a treaty depends upon international law exclusively, and although the implementation of many treaties calls for changes in the internal law of the parties, this is within their contemplation from the outset, and the entry into force of the treaty may be and often is expressly made dependent upon the procurement of the necessary changes in their internal laws<sup>4</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 26. This rule (also called *pacta sunt servanda*) has been described as the fundamental principle of the law of treaties: see the Commentary of the International Law Commission, YILC 1966 II 211. For a practical application of the rule, see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 78-79 (para 142). See also *Rights of Nationals of the United States of America in Morocco (France v United States of America)* ICJ Reports 1952, 176 at 212; *North Atlantic Fisheries Arbitration* 11 RIAA 167 at 188 (1910). For an application of the rule by the English courts, noting that the principle cannot require departure from what has been agreed, see *European Roma Rights Centre v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55, [2005] 2 AC 1, [2005] 1 All ER 527.

3 Vienna Convention on the Law of Treaties art 27. This proposition is subject to the qualification that a manifest violation of a provision of the internal law of a party regarding competence to conclude treaties may in certain circumstances be invoked by that party: see art 46; and PARA 101. As to the rule that a state may not rely upon the inadequacies of its own law in response to a claim that it has incurred responsibility to another state in international law see PARA 333.

4 As to the relationship between treaties and English law see PARA 17 et seq.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(2) APPLICATION OF TREATIES/92. Successive treaties relating to the same subject matter.

## **92. Successive treaties relating to the same subject matter.**

It may happen that the same matter is the subject of successive treaties<sup>1</sup>, the parties to which may or may not be exactly the same<sup>2</sup>. When a treaty specifies that it is subject to, or that it is not to be considered incompatible with, an earlier or later treaty, the provisions of that other treaty prevail<sup>3</sup>. When all the parties to the earlier treaty are also parties to the later treaty, but the earlier treaty is not terminated or suspended by one later in date<sup>4</sup>, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty<sup>5</sup>. When the parties to the later treaty do not include all the parties to the earlier one, the same rule applies as between states which are parties to both treaties<sup>6</sup>, and as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both are parties governs their mutual rights and obligations<sup>7</sup>.

The foregoing rules are subject to the Charter of the United Nations<sup>8</sup> which provides that, in the event of a conflict between the obligations of members of the United Nations under the Charter<sup>9</sup> and their obligations under any other international agreement, their obligations under the Charter prevail<sup>10</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 See Aust *Modern Treaty Law and Practice* (2nd Edn, 2008) Ch 12. The rules set out in the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 30 (see the text and notes 3-10) that regulate this situation are residual in nature and many treaties, in particular multilateral treaties, contain specific provisions regulating their relationship to other treaty or treaties. Art 30 and the principles it contains have also been considered as part of the work of the International Law Commission under the rubric Fragmentation of international law: difficulties arising from the diversification and expansion of international law: see in particular the Report of the Study Group of 13 April 2006, Report of the International Law Commission, 58th Session, A/CN.4/L.682.

3 Vienna Convention on the Law of Treaties art 30 para 2.

4 As to the potential termination or suspension of treaties where all the parties to the treaty conclude a later treaty relating to the same subject matter see the Vienna Convention on the Law of Treaties art 59; and PARA 106.

5 Vienna Convention on the Law of Treaties art 30 para 3.

6 Vienna Convention on the Law of Treaties art 30 para 4(a).

7 Vienna Convention on the Law of Treaties art 30 para 4(b). See also *Entico Corpn Ltd v United Nations Educational Scientific and Cultural Association* [2008] EWHC 531 (Comm), [2008] 2 All ER (Comm) 97 at [18]. Both art 30 para 4(a) and (b) are without prejudice to art 41 (see PARA 100) or to any question of the termination and suspension of the treaty under art 60 (see PARA 107) or to any question of responsibility which may arise for a state from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another state under another treaty: see art 30 para 5.

8 I.e the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015).

9 As to the membership of the United Nations see PARA 520.

10 Vienna Convention on the Law of Treaties art 30 para 1; Charter of the United Nations art 103. See the *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Provisional Measures)* ICJ Reports 1992, 3. In *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, [2008] 3 All ER 28, the House of Lords considered and applied art 103 of the Charter of the United Nations in the context of

conflicting obligations under binding Security Council resolutions and the European Convention of Human Rights. In Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat International Foundation (Spain, interveners) v EU Council* [2008] ECR I-6351, [2008] All ER (D) 34 (Sep), ECJ, the European Court of Justice found that it was not a consequence of the principles governing the international legal order under the United Nations (including art 103 of the UN Charter) that any judicial review of the internal lawfulness of a contested EC regulation in the light of fundamental freedoms was excluded by virtue of the fact that that measure was intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(2) APPLICATION OF TREATIES/93. Application of treaties in time.

### **93. Application of treaties in time.**

Unless a different intention appears from the treaty<sup>1</sup> or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party<sup>2</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 28. See also arts 18, 24 para 4, 25; and PARAS 82, 89, 90. The Convention itself provides that without prejudice to the application of customary international law, the Convention applies only to treaties concluded by states after the entry into force of the Convention with regard to such states: art 4. The principle of non-retroactivity stated in the text is also supported by the *Ambatielos (Greece v United Kingdom) (Preliminary Objection)* ICJ Reports 1952, 28 at 40. In English law the principle is supported by *The Eliza Ann* (1813) 1 Dods 244, 6 BILC 345. A special clause may be expressly given a retroactive application: *Mavrommatis Palestine Concessions* PCIJ Ser A No 2 (1924). See also the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') arts 13-15, and the Commentary to articles 13-15, International Law Commission Report, 53rd Session, A/56/10, YILC 2001, vol II(2); and PARA 359 et seq. See also Higgins 'Time and the Law: International Perspectives on an Old Problem' in *Themes & Theories: Selected Essays, Speeches, and Writings in International Law* (2009) p 875 et seq.



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#### **94. Territorial application.**

Unless a different intention appears from the treaty<sup>1</sup> or is otherwise established, a treaty is binding upon each party in respect of its entire territory<sup>2</sup>. In the past, because of the constitutional complexities involved in legislating for overseas territories, the United Kingdom has made a practice of procuring the insertion in its treaties of territorial or colonial application clauses, although colonial application clauses are of course no longer used and territorial application clauses are now less common in modern multilateral treaties<sup>3</sup>. There exists also a device whereby a state makes a declaration as to the territorial application of the act of signature<sup>4</sup> or ratification<sup>5</sup>. Since 1967, when expressing consent to be bound by a multilateral treaty the United Kingdom has followed a consistent practice of declaring in writing to the depositary to which, if any, of its overseas territories the treaty will extend.

1 As to the meaning of 'treaty' see PARA 71.

2 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 29. Thus treaties entered into by the United Kingdom apply to overseas territories for which the United Kingdom is internationally responsible in the absence of some indication to the contrary.

3 Such a clause may provide either that the treaty applies to territories for whose international relations the United Kingdom is responsible, if special notice to that effect is given, or, conversely, that such territories are included unless a declaration is made or notice given that the treaty is not to apply to specified territories in the absence of a special acceptance on their behalf. In some cases the United Kingdom has objected to becoming a party to a multilateral convention which did not contain such a clause: see Contemporary Practice of the United Kingdom in the Field of International Law 1962 (II) 237; British Practice in International Law 1963 (II) 144.

4 As to signature see PARA 77.

5 For example, the United Kingdom ratified the Convention on the High Seas (Geneva, 29 April 1958; TS 5 (1963); Cmnd 1929) subject to a declaration that this did not extend to certain specified territories, and ratified the Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, 1 July 1968; TS 88 (1970); Cmnd 4474) in respect of the United Kingdom and other specified territories only. As to modern British practice see Aust *Modern Treaty Law and Practice* (2nd Edn, 2008) 206-208. As to the influence of territorial application clauses on rules regarding state succession to treaties see PARA 57. As to ratification see PARA 79. As to the extra-territorial application of human rights territories see eg Application 52207/99 *Bankovic v Belgium* (2002) 11 BHRC 435, ECtHR; *R (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, [2007] 3 All ER 685.

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### (3) INTERPRETATION OF TREATIES

#### 95. The general rule.

A treaty<sup>1</sup> must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose<sup>2</sup>. The context comprises<sup>3</sup>, in addition to the text, including its preamble and annexes: (1) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty<sup>4</sup>; and (2) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted<sup>5</sup> by the other parties as an instrument related to the treaty<sup>6</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 31 para 1; *Factory at Chorzów (Jurisdiction)* PCIJ Ser A No 9 at 24 (1927). See Gardiner *Treaty Interpretation* (2008); I Oppenheim's International Law (9th Edn, 1992) pp 1266-1284; Aust *Modern Treaty Law and Practice* (2nd Edn, 2007) Ch 13. Although the Vienna Convention on the Law of Treaties art 31 para 1 is frequently regarded as the starting point for any exercise in interpretation, the elements of art 31 (see also PARA 96) are not arranged hierarchically, and should be applied in a single combined operation: see the Commentary of the International Law Commission, YILC 1966 vol II, 219-220.

The most generally favoured basic approach to interpretation is that which has primary regard to the textual meaning of the treaty: see eg the *Polish Postal Service in Danzig Case (Advisory Opinion)* PCIJ Ser B No 11 at 37 (1925); *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* ICJ Reports 1950, 4 at 8. The primacy of the treaty language, read in context and purposively, is of critical importance: *In re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, [2006] 1 AC 495, [2006] 1 All ER 786 at [31] per Lord Steyn. For a recent example of the English courts emphasising the importance of the textual approach and rejecting the need to search for the common intention of the parties, save as reflected in the text, see *Czech Republic v European Media Ventures SA* [2007] EWHC 2851 (Comm), [2008] 1 All ER (Comm) 531. As to the principle of effectiveness in the interpretation of treaties and its limitations see the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase) (Advisory Opinion)* ICJ Reports 1950, 65; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase) (Advisory Opinion)* ICJ Reports 1950, 221; see also *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* ICJ Reports 1994, 6 at 25-26. As to interpretation of treaties in the light of their object and purpose see eg *Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objection)* ICJ Reports 1996, 803 at 813-815; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Reports 1986, 14; *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, [1999] 2 All ER 545, HL. It has been suggested that the reference to the object and purpose of the treaty is a secondary or ancillary process in the application of the general rule on interpretation: Sinclair *The Vienna Convention on the Law of Treaties* (1973) p 130; and see also Aust's *Modern Treaty Law and Practice* (2nd Edn) 235. Greater weight on object and purpose may be placed so far as concerns the interpretation of human rights treaties such as the European Convention on Human Rights. The case law of the European Court of Human Rights shows that the Court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so, but the process of implication is to be carried out with caution: *Brown v Stott (Procurator Fiscal, Dunfermline)* [2003] 1 AC 681 at 703, [2003] 2 All ER 97 at 113-114, PC.

It has become increasingly common for the English courts to have to interpret treaties, and to apply the rules established by the Vienna Convention on the Law of Treaties to that effect. As to interpretation by the English courts of treaties incorporated into domestic legislation by virtue of a statute, and the application of the Convention in this context, see eg *Morris v KLM Royal Dutch Airlines, King v Bristow Helicopters Ltd* [2002] UKHL 7, [2002] 2 AC 628, [2002] 2 All ER 565 at [80]-[82]; *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 3 All ER 304, [2003] 1 WLR 856 at [6]; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, [2006] 3 All ER 305 at [4]. As the Vienna Convention on the Law of Treaties art 31 is taken as reflecting customary international law, it may still be applied to treaties that entered into force prior to the convention: see eg *European Roma Rights Centre v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55, [2005] 2 AC 1, [2005] 1

All ER 527 at [18]-[19]. More generally as to the interpretation by the English courts of statutes which incorporate or are based upon treaties, see eg *Pan-American World Airways Inc v Department of Trade* [1976] 1 Lloyd's Rep 257, 119 Sol Jo 657, CA; *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] AC 255, [1985] 1 All ER 129, HL; *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, [1967] 3 All ER 663, CA; *Salomon v Customs and Excise Comrs* [1967] 2 QB 116, [1966] 3 All ER 871, 9 BILC 685, CA; *Monte Ulia (Owners) v Banco (Owners), The Banco* [1971] P 137 at 145, [1971] 1 All ER 524 at 529, CA; *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616, [1969], 1 All ER 82, CA; *Federal Steam Navigation Co Ltd v Department of Trade and Industry* [1974] 2 All ER 97, [1974] 1 WLR 505, HL. As to interpretation of statutes generally see **STATUTES**.

The general rule remains that English courts have no power to interpret treaties not incorporated by statute into municipal law: see eg *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, [2002] 4 All ER 1028 at [28] per Lord Hoffman. Exceptionally the court may interpret such a treaty if its provisions have been incorporated into, for example, a contract and may refer to a treaty and its terms as part of the factual background against which a particular issue is to be determined: see *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 500-501, sub nom *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523 at 545, HL, per Lord Oliver of Aylmerton; *Littrell v United States of America (No 2)* [1994] 4 All ER 203 at 214-215, [1995] 1 WLR 82 at 93, CA, per Hoffman LJ; *Lonrho Exports Ltd v Export Credits Guarantee Department* [1999] Ch 158, [1996] 4 All ER 673. Similarly, a treaty may fall for interpretation by the English courts where an arbitration award made pursuant to the treaty is challenged within the jurisdiction: see eg *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2006] QB 432, [2006] 2 All ER 225.

3 As an example of consideration of the relevant context by the English courts see *R v Secretary of State for the Home Department, ex p Read* [1989] AC 1014, sub nom *Read v Secretary of State for the Home Department* [1988] 3 All ER 993, HL.

4 Vienna Convention on the Law of Treaties art 31 para 2(a); *Ambatielos (Greece v United Kingdom) (Preliminary Objection)* ICJ Reports 1952, 28 at 44.

5 As to acceptance see PARA 79.

6 Vienna Convention on the Law of Treaties art 31 para 2(b); *Ambatielos (Greece v United Kingdom) (Preliminary Objection)* ICJ Reports 1952, 28 at 44.

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## 96. Further elements of the general rule.

Together with the context<sup>1</sup>, the following must be taken into account: (1) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions<sup>2</sup>; (2) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation<sup>3</sup>; and (3) any relevant rules of international law applicable in the relations between the parties<sup>4</sup>. A special meaning different from the general or usual meaning is to be given to a term if it is established that the parties to the treaty so intended<sup>5</sup>.

<sup>1</sup> See PARA 95.

<sup>2</sup> Vienna Convention on the Law of Treaties art 31 para 3(a). As to subsequent agreements see generally Gardiner *Treaty Interpretation* (1st Edn, 2008) pp 203-249, Aust's *Modern Treaty Law and Practice* (2nd Edn, 2008) pp 238-241.

<sup>3</sup> Vienna Convention on the Law of Treaties art 31 para 3(b). As to subsequent practice see generally Gardiner *Treaty Interpretation* (1st Edn, 2008) pp 203-249, Aust's *Modern Treaty Law and Practice* (2nd Edn, 2008) pp 241-243, McNair's *Law of Treaties* 424-429. See also *R (on the application of Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1, [2004] 3 All ER 65.

<sup>4</sup> Vienna Convention on the Law of Treaties art 31 para 3(c). See generally Gardiner *Treaty Interpretation* (1st Edn, 2008) pp 250-298. The Vienna Convention on the Law of Treaties art 31 para 3(c) has been the object of considerable scrutiny in recent years (see eg McLachlan 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2005) 54 ICLQ pp 279-320; and the work of the International Law Commission on Fragmentation of International Law in particular the Report of the Study Group of 13 April 2006, Report of the International Law Commission, 58th Session, A/CN.4/L.682) and was applied to controversial effect in *Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Reports 2003, 161 (see the Separate Opinion of Judge Higgins at 225, 237). See also Application 35763/97 *Al-Adsani v United Kingdom* (2001) 34 EHRR 273, 12 BHRC 88, ECtHR. As to application in the English courts see *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221, [2006] 1 All ER 575 at [29]; and *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, [2008] 3 All ER 28 at [36]-[37] (by reference to the jurisprudence of the European Court of Human Rights). See also *Entico Corporation Ltd v United Nations Educational Scientific and Cultural Association, Secretary of State for Foreign and Commonwealth Affairs intervening* [2008] EWHC 531 (Comm), [2008] 2 All ER (Comm) 97. As to the interpretation of constituent treaties by the practice of international organisations see *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* ICJ Reports 1950, 4 at 9; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation (Advisory Opinion)* ICJ Reports 1960, 150 at 167; *Certain Expenses of the United Nations (Advisory Opinion)* ICJ Reports 1962, 151 at 157; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Request for Advisory Opinion)* ICJ Reports 1971, 359.

<sup>5</sup> Vienna Convention on the Law of Treaties art 31 para 4. See generally Gardiner *Treaty Interpretation* (1st Edn, 2008) pp 250-298. The burden of proving that a term in a treaty was intended to bear a meaning other than its general or usual meaning is upon the party which alleges it: *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53 (1933) (where Denmark failed to prove that 'Greenland' in administrative and legislative acts bore a meaning other than its usual geographical meaning); *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua intervening)* ICJ Reports 1992, 351 at 585. The general or usual meaning is that which the term bore at the time the treaty was concluded: *Rights of Nationals of the United States of America in Morocco (France v United States of America)* ICJ Reports 1952, 176; *European Roma Rights Centre v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55, [2005] 2 AC 1, [2005] 1 All ER 527 at [18]-[19]. For an example of a case where the court referred to the meaning of a given term in customary international law to assist in the interpretation of a treaty term see *R (on the application of Kibris Türk Hava Yolları CTA Holidays) v Secretary of State for Transport (Republic of Cyprus intervening)* [2009] EWHC 1918 (Admin), [2009] All ER (D) 295 (Jul) at [36]-[37].



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(3) INTERPRETATION OF TREATIES/97. Supplementary means of interpretation.

## 97. Supplementary means of interpretation.

Recourse may be had to supplementary means of interpretation, including the preparatory work<sup>1</sup> of the treaty<sup>2</sup> and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of the general rule<sup>3</sup> or to determine the meaning when the interpretation according to that rule either leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable<sup>4</sup>. It appears that the use of preparatory work is admissible in such circumstances even as against a party to a treaty which did not itself participate in its negotiation or conclusion, but became a party by subsequent accession<sup>5</sup>. In the interests of uniformity of application of conventions the courts in the United Kingdom can in certain circumstances refer to travaux préparatoires. The following conditions must be fulfilled before such use is made of them: (1) that the material involved is public and accessible<sup>6</sup>; and (2) that the travaux préparatoires clearly point to a definite legislative intention<sup>7</sup>.

1 'Preparatory work' is not defined in the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmd 7964). In general terms it means the record of the drafting of the treaty and its negotiation; it is very frequently referred to as the travaux préparatoires.

2 As to the meaning of 'treaty' see PARA 71.

3 As to the general rule see the Vienna Convention on the Law of Treaties art 31; and PARAS 95-96. Where the meaning of the text is sufficiently clear there is no need for recourse to such supplementary means of interpretation (see *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* ICJ Reports 1950, 4 at 8), although supplementary means may be used for purposes of confirmation: see eg *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* ICJ Reports 1994, 6; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility)* ICJ Reports 1995, 6 at 24. See generally Gardiner *Treaty Interpretation* (1st Edn, 2008) pp 306-310, 316-328.

4 Vienna Convention on the Law of Treaties art 32. As to resort to preparatory work in recent cases see eg *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility)* ICJ Reports 1995, 6 at 24 (but cf the Dissenting Opinion of Vice-President Schwebel at 27); *Kasikili/Sedudu Island (Botswana/Namibia)* ICJ Reports 1999, 1045 at 1074; *Legality of Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections)* ICJ Reports 2004, 279 at 319; Application 52207/99 *Bankovic v Belgium and Others* [2001] 11 BHRC 435, ECtHR. As to recent application in the English courts see *Effort Shipping Company Limited v Linden Management SA* [1998] AC 605, [1998] 1 All ER 495, HL; *R (on the application of Mullan) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1, [2004] 3 All ER 65, at [50]-[54]; *Aerotel Ltd v Telco Holdings Ltd* [2006] EWCA Civ 1371, [2007] 1 All ER 225, [2007] RPC 117 at [30]. See also *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 640, [1975] 1 All ER 810 at 838, HL. As to resort to the circumstances of the conclusion of a treaty see *Legality of Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections)* ICJ Reports 2004, 279 at 319-323 (in conjunction with an analysis of the preparatory works). For further forms of supplementary means of interpretations and interpretative tools see 1 Oppenheim's International Law (9th Edn) pp 1277-1282.

See generally Gardiner *Treaty Interpretation* (2008) Ch 8, Aust's Modern Treaty Law and Practice (2nd Edn, 2008) pp 244-249.

5 It is submitted that the statement in the text is correct in spite of remarks to the contrary in the *Territorial Jurisdiction of the International Commission of the River Oder Case* PCIJ Ser A No 23 (1929) which, it is thought, does not reflect current international practice: see 1 O'Connell's International Law (2nd Edn) 264; Aust's Modern Treaty Law and Practice (2nd Edn, 2008) pp 247.

6 *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 2 All ER 696, HL. See *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] AC 255, [1985] 1 All ER 129, HL; *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, [2006] 1 AC 495, [2006] 1 All ER 786; *Czech Republic v European Media Ventures* [2007] EWHC 2851 (Comm), [2008] 1 All ER (Comm) 531.

7     *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 2 All ER 696, HL. See *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] AC 255, [1985] 1 All ER 129, HL; *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605, [1998] 1 All ER 495; *Morris v KLM Royal Dutch Airlines*, *King v Bristow Helicopters* [2002] UKHL 7, [2002] 2 AC 628, [2002] 2 All ER 565; *R (on the application of Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1, [2004] 3 All ER 65 at [50].

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(3) INTERPRETATION OF TREATIES/98. Treaties in two or more languages.

## 98. Treaties in two or more languages.

When a treaty<sup>1</sup> has been authenticated<sup>2</sup> in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text is to prevail<sup>3</sup>. The terms of the treaty are presumed to have the same meaning in each authentic text<sup>4</sup>. Except where a particular text is to prevail as above, when a comparison of the authentic texts discloses a difference of meaning which the general rules as to interpretation<sup>5</sup> do not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, is to be adopted<sup>6</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 As to authentication see PARA 75.

3 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmd 7964) art 33 para 1. See *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 2 All ER 696, HL (meaning of 'damage' ('avare') in the International Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 12 October 1929; TS 11 (1933); Cmd 4284) art 26(2)); cf *R (on the application of the Federation of Tour Operators) v HM Treasury* [2007] EWHC 2062 (Admin), [2008] STC 547, [2007] All ER (D) 18 (Sep), affd [2008] EWCA Civ 752, [2008] STC 2524. See generally Gardiner *Treaty Interpretation* (2008) pp 353-385, Aust's *Modern Treaty Law and Practice* (2nd Edn, 2008) pp 250-255. A version of the treaty in a language other than one of those in which the text was authenticated is considered an authentic text only if the treaty so provides or the parties so agree: Vienna Convention on the Law of Treaties art 33 para 2. See *Mavrommatis Palestine Concessions* PCIJ Ser A No 2 (1924). For a case concerning the interpretation of a treaty text and its translation incorporated into a statute see *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616, [1969] 1 All ER 82, CA. See also *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, [1977] 3 All ER 1048, HL.

4 Vienna Convention on the Law of Treaties art 33 para 3. See *Kasikili/Sedudu Island (Botswana/Namibia)* ICJ Reports 1999, 1045 at 1062.

5 For the general rules see the Vienna Convention on the Law of Treaties arts 31, 32; and PARAS 95-97.

6 Vienna Convention on the Law of Treaties art 33 para 4. See *LaGrand (Germany v United States of America)* ICJ Reports 2001, 466 at 501-505; *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* ICJ Reports 1988, 69. See also *Channel Tunnel Group Ltd and France-Manche SA v United Kingdom and France*, Partial Award of 30 January 2007, Arbitral Tribunal, paras 93, 295-302. In *R (on the application of the Federation of Tour Operators) v HM Treasury* [2007] EWHC 2062 (Admin), [2008] STC 547, [2007] All ER (D) 18 (Sep), affd [2008] EWCA Civ 752, [2008] STC 2524, some primacy was given to the English text of the treaty then before the court, not because it was more authentic than the other texts, but because the travaux préparatoires were in English and reference to them necessarily involved reference to the English texts. Furthermore, the court considered that the texts in the other languages were translations of the English text and could not have been intended to change the meaning of the English.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(3) INTERPRETATION OF TREATIES/99. Treaties and third states.

## 99. Treaties and third states.

A treaty<sup>1</sup> does not create either obligations or rights for a third state without its consent<sup>2</sup>. However, an obligation arises for a third state from a provision of a treaty if the parties to it intend the provision to be the means of establishing the obligation and the third state expressly accepts<sup>3</sup> that obligation in writing<sup>4</sup>. A right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third party assents to it<sup>5</sup>. Its assent is presumed so long as the contrary is not indicated, unless the treaty otherwise provides<sup>6</sup>; and in exercising such a right the third state must comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty<sup>7</sup>.

Nothing in these provisions precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognised as such<sup>8</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 Vienna Convention on the Law of Treaties (Geneva, 23 May 1969; TS 58 (1980); Cmd 7964) art 34. 'Third state' means a state not party to the treaty: art 2 para 1(h). This statement of the maxim *pacta tertiis nec nocent nec prosunt* is also recognised by eg *Free Zones of Upper Savoy and the District of Gex Case* PCIJ Ser A/B No 46 at 147, 148 (1932); *Territorial Jurisdiction of the International Commission of the River Oder Case* PCIJ Ser A No 23 at 19-22 (1929). See also *The Jonge Josias* (1809) Edw 128 at 130-131, 6 BILC 534 obiter per Sir William Scott; *The Marie Glaeser* [1914] P 218. See generally Aust's *Modern Treaty Law and Practice* (2nd Edn, 2008) pp 256-261; Shaw's *International Law* (6th Edn, 2008) pp 928-930. As to consent see PARA 76.

3 As to acceptance see PARA 79.

4 Vienna Convention on the Law of Treaties art 35. As to the revocation or modification of obligations or rights of third states see art 37. The provision of art 35 makes clear that it is not the treaty itself but a collateral agreement whereby the third state becomes bound by the obligation. It is subject to an exception whereby an aggressor state may be bound by an obligation in relation to a treaty which may arise for an aggressor state in consequence of measures taken in conformity with the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) with reference to that state's aggression: Vienna Convention on the Law of Treaties art 75. As to measures taken by the United Nations in cases of aggression see PARA 525.

5 Vienna Convention on the Law of Treaties art 36 para 1.

6 Vienna Convention on the Law of Treaties art 36 para 1.

7 Vienna Convention on the Law of Treaties art 36 para 2. As to the revocation or modification of third party rights see art 37. See also the *Free Zones of Upper Savoy and the District of Gex Case* PCIJ Ser A/B No 46 at 147, 148 (1932); *Aaland Islands Case* LoNJ 1920 Supp No 3 at 5.

For examples of treaties making provisions in favour of third states generally see the Convention respecting the Free Navigation of the Suez Maritime Canal (Constantinople, 29 October 1888; C 5623); Treaty of Peace with Germany (Treaty of Versailles) (Versailles, 28 June 1919; TS 4 (1919); Cmd 153) art 380 (Kiel Canal) (as to which see the *SS 'Wimbledon'* PCIJ Ser A No 1 (1923) at 22 to the effect that the Kiel canal had ceased to be an internal and national navigable waterway and had become an international waterway for the benefit of all nations of the world; ie rights *erga omnes* had been established by the Treaty of Versailles). As to dispositive treaties and state succession see PARA 59.

8 Vienna Convention on the Law of Treaties art 38. However, a treaty may codify what is existing international law, which is binding upon third states without need for reference to the treaty.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(3) INTERPRETATION OF TREATIES/100. Amendment and modification of treaties.

### **100. Amendment and modification of treaties.**

A treaty<sup>1</sup> may be amended by agreement between the parties, and the rules regarding the conclusion and entry into force of treaties laid down in the Vienna Convention on the Law of Treaties<sup>2</sup> apply to such an agreement except in so far as the treaty may otherwise provide<sup>3</sup>. This is the case with both bilateral and multilateral treaties, save that, in the case of multilateral treaties, unless the treaty provides otherwise<sup>4</sup>: (1) any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting states, each one of which has the right to take part in the decision as to the action to be taken in regard to the proposal and the negotiation and conclusion of any agreement for the amendment of the treaty<sup>5</sup>; (2) every state entitled to become a party to the treaty is also entitled to become a party to the treaty as amended<sup>6</sup>; (3) the amending agreement does not bind any state already a party to the treaty which does not become a party to the amending agreement<sup>7</sup>; and (4) any state which becomes a party to the treaty after the entry into force of the amending agreement is, failing an expression of a different intention by that state, to be considered as a party to the treaty as amended and to be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement<sup>8</sup>.

Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if (a) the possibility of such a modification is provided for in the treaty<sup>9</sup>; or (b) the modification in question is not prohibited by the treaty and does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations, and does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole<sup>10</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 I.e. the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964).

3 Vienna Convention on the Law of Treaties art 39. See generally Aust's Modern Treaty Law and Practice (2nd Edn, 2008) p 262, with particular reference to the practical importance of amendments to treaties and examples of differing mechanisms for amendment established by specific multilateral treaties; and Shaw's International Law (6th Edn, 2008) pp 930-932.

4 See the Vienna Convention on the Law of Treaties art 40 para 1. It should be noted that the amendment provided for is by way of agreement, i.e. the formalities of a further treaty are not necessarily required.

5 Vienna Convention on the Law of Treaties art 40 para 2.

6 Vienna Convention on the Law of Treaties art 40 para 3.

7 Vienna Convention on the Law of Treaties art 40 para 4. In this case the provisions of art 30 para 4(b) (see PARA 92) apply: see art 40 para 4.

8 Vienna Convention on the Law of Treaties art 40 para 5.

9 Vienna Convention on the Law of Treaties art 41 para 1(a). In a case falling under para 1(a), unless the treaty otherwise provides, the parties in question must notify the other parties of their intention to conclude the agreement and the modification to the treaty for which it provides: art 41 para 2.

10 Vienna Convention on the Law of Treaties art 41 para 1(b).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(4) INVALIDITY OF TREATIES/101. Invalidity: lack of competence to conclude treaties.

## (4) INVALIDITY OF TREATIES

### 101. Invalidity: lack of competence to conclude treaties.

A state may not invoke the fact that its consent to be bound<sup>1</sup> by a treaty<sup>2</sup> has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest<sup>3</sup> and concerned a rule of its internal law of fundamental importance<sup>4</sup>. If the authority of a representative to express the consent of a state to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating states<sup>5</sup> prior to his expressing such consent<sup>6</sup>.

1 As to consent to be bound see PARA 76.

2 As to the meaning of 'treaty' see PARA 71.

3 A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith: Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 46 para 2.

4 Vienna Convention on the Law of Treaties art 46 para 1. As to the procedure in such cases see art 65; and PARA 109. As to the separability of treaty provisions in certain circumstances see art 44. As to the loss of a right to invoke a ground for invalidating a treaty by reason of waiver or acquiescence see art 45. As to the consequences of invalidity see arts 43, 69. The provisions of a void legal treaty have no force. See generally 1 Oppenheim's International Law (9th Edn) pp 1284-1295; Aust's Modern Treaty Law and Practice (2nd Edn, 2008) Ch 17.

Arguments based on alleged unconstitutionality of treaties were rejected in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility)* ICJ Reports 1994, 112 at 121-122; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections)* ICJ Reports 1996, 595 at 621-622. A limitation of a head of state's capacity is not manifest unless at least properly publicised; there is no general legal obligation for states to keep themselves informed of legislative and constitutional developments in other states which are or may become important for the international relations of these states: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* ICJ Reports 2002, 303 at 430. The rule stated in the text appears to mean that a state cannot invoke its internal law unless its agent acted in open and notorious excess of his authority. The case contemplated therefore appears to be unlikely to arise in practice. See also *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53 (1933); *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 724 (1925). In neither of these cases did the tribunal pay any regard to the point. As to the rule precluding a state from invoking the provisions of its internal law as justification for its failure to perform a treaty see the Vienna Convention on the Law of Treaties art 27; and PARA 91.

5 As to the meaning of 'negotiating states' see PARA 77 note 6.

6 Vienna Convention on the Law of Treaties art 47. This seems to be a largely theoretical case.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(4) INVALIDITY OF TREATIES/102. Invalidity: error, fraud and corruption.

## **102. Invalidity: error, fraud and corruption.**

A state may invoke an error in a treaty<sup>1</sup> as invalidating its consent to be bound<sup>2</sup> by the treaty if the error relates to a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty<sup>3</sup>. If a state has been induced to conclude a treaty by the fraudulent conduct of another negotiating state<sup>4</sup>, the state may invoke the fraud as invalidating its consent to be bound by the treaty<sup>5</sup>. Likewise, if the expression of a state's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating state, the state may invoke such corruption as invalidating its consent to be bound by the treaty<sup>6</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 As to consent to be bound see PARA 76.

3 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 48 para 1. The error cannot be invoked if the state in question contributed by its own conduct to the error or if the circumstances were such as to put the state on notice of a possible error (art 48 para 2), and an error relating only to the wording of the text of a treaty does not affect its validity (art 48 para 3). As to the corrections of errors see art 79. An error in a map annexed to a boundary treaty was invoked in the *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* ICJ Reports 1962, 6, but without success. See generally, as to error, fraud and corruption, Aust's *Modern Treaty Law and Practice* (2nd Edn, 2008) pp 315-317; Shaw's *International Law* (6th Edn) pp 941-944. As to the procedure in such cases see Vienna Convention on the Law of Treaties art 65; and PARA 109. As to the separability of treaty provisions in certain circumstances see art 44. As to the loss of a right to invoke a ground for invalidating a treaty by reason of waiver or acquiescence see art 45. As to the consequences of invalidity see arts 43, 69.

4 As to the meaning of 'negotiating state' see PARA 77 note 6.

5 Vienna Convention on the Law of Treaties art 49. As to separability of treaty provisions see art 44(4). As to the meaning of 'fraud' see YILC 1966 vol II, 244.

6 Vienna Convention on the Law of Treaties art 50. As to separability of treaty provisions see art 44(4). As to the meaning of 'corruption' see YILC 1966 vol II, 245.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(4) INVALIDITY OF TREATIES/103. Invalidity: coercion, threat or use of force, and conflict with a peremptory norm.

### **103. Invalidity: coercion, threat or use of force, and conflict with a peremptory norm.**

The expression of a state's consent to be bound<sup>1</sup> by a treaty<sup>2</sup> which has been procured by the coercion of its representative through acts or threats directed against him is without any legal effect<sup>3</sup>. Further, a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations<sup>4</sup>. A treaty is also void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law, which is to say a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character<sup>5</sup>.

1 As to consent to be bound see PARA 76.

2 As to the meaning of 'treaty' see PARA 71. As to the consequences of invalidity see the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 69.

3 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 51. For the case of Dr Hacha, President of Czechoslovakia, against whom threats were used by Nazis on 15 March 1939 see McNair's Law of Treaties 208. For the consequences of invalidity see the Vienna Convention on the Law of Treaties arts 43, 69. The provisions of a treaty which is void under art 51 are not separable, and the whole treaty is therefore void in its entirety: art 44 para 5. See generally, 1 Oppenheim's International Law (9th Edn) pp 1294-1295; Aust's Modern Treaty Law and Practice (2nd Edn, 2008) pp 317-323.

4 See the Vienna Convention on the Law of Treaties art 52. The principle of international law referred to is embodied in the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmnd 7015) art 2 para 4, which sets out the modern customary international law on the use of force. Unquestionably treaties of peace concluded before the era of the Covenant of the League of Nations (Versailles, 28 June 1919; TS 4 (1919); Cmnd 153) and the International Treaty for the Renunciation of War as an Instrument of National Policy (The Kellogg-Briand Pact) (Paris, 27 August 1928; TS 29 (1929); Cmnd 3410) were and are valid. Further, the Vienna Convention on the Law of Treaties art 52 does not apply to the threat or use of lawful force. A plea that an agreement was procured by the use of unlawful force was rejected in the *Fisheries Jurisdiction (United Kingdom v Iceland)* (*Jurisdiction of the Court*) ICJ Reports 1973, 3 at 14.

The provisions of a treaty which is void under art 52 are not separable, and the whole treaty is therefore void in its entirety: art 44 para 5.

5 Vienna Convention on the Law of Treaties art 53. Further, if a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates: see art 64. Mere emergence of new requirements of international law for the protection of the environment, short of a new peremptory norm of environmental law, does not preclude performance of a treaty: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (*Order of 5 February 1997*) ICJ Reports 1997, 3. For procedures in relation to the settlement of disputes concerning the application or interpretation of Vienna Convention on the Law of Treaties arts 53 and 64, see art 66(a). As to the consequences of invalidity see art 71. The concept of *jus cogens* was referred to by the International Court of Justice in eg *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (*Jurisdiction and Admissibility*) ICJ Reports 2006, 6 at 32, 52 (paras 64, 125), and has become well established, not least in terms of application by the English courts (see *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* (No 3) [2000] 1 AC 147 at 197-199, sub nom *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* (*Amnesty International intervening*) (No 3) [1999] 2 All ER 97 at 107-109, HL; *A v Secretary of State for the Home Department* (No 2) [2005] UKHL 71, [2006] 2 AC 221, [2006] 1 All ER 575 at [33]; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* (*Secretary of State for Constitutional Affairs intervening*) [2006] UKHL 26, [2007] 1 AC 270, [2007] 1 All ER 113 at [42]-[44] per Lord Hoffman). See also Application 35763/97 *Al-Adsani v United Kingdom* (2001) 34 EHRR 273, 12 BHRC 88, ECHR. However, there are no clearly established criteria for identifying which norms of international law have a peremptory character, and there is

controversy as to which norms do qualify and as to their precise effect. Those peremptory norms that are clearly accepted and recognised include the prohibitions of aggression, genocide, slavery and racial discrimination, crimes against humanity and torture, and the right to self-determination: see Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 26 and the Commentary to Article 26, para 5, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2) (referred to in *R (on the application of Al Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, [2007] QB 621, [2006] 3 WLR 954 at [66]); and PARA 362.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(5) DEPOSIT AND REGISTRATION OF TREATIES/104. Depositaries.

## **(5) DEPOSIT AND REGISTRATION OF TREATIES**

### **104. Depositaries.**

It is usual in modern multilateral treaties to designate one or more states, or the chief executive officer of an international organisation, such as the Secretary-General of the United Nations, as the depositary<sup>1</sup>. The designation of the depositary of a treaty<sup>2</sup> may be made by the negotiating states<sup>3</sup>, either in the treaty itself or in some other manner<sup>4</sup>. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance; in particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a state and a depositary with regard to the performance of the latter's functions does not affect that obligation<sup>5</sup>.

The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting states, comprise in particular:

- 17 (1) keeping custody of the original text of the treaty and of any full powers delivered to the depositary<sup>6</sup>;
- 18 (2) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the states entitled to become parties to the treaty<sup>7</sup>;
- 19 (3) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it<sup>8</sup>;
- 20 (4) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the state in question<sup>9</sup>;
- 21 (5) informing the parties and the states entitled to become parties to the treaty of acts, notifications and communications relating to the treaty<sup>10</sup>;
- 22 (6) informing the states entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited<sup>11</sup>;
- 23 (7) registering the treaty with the Secretariat of the United Nations<sup>12</sup>;
- 24 (8) performing other specified functions<sup>13</sup>.

In the event of any difference appearing between a state and the depositary as to the performance of the latter's functions, the depositary must bring the question to the attention of the signatory states and the contracting states or, where appropriate, of the competent organ of the international organisation concerned<sup>14</sup>.

1 The depositary may be one or more states, an international organisation or the chief administrative officer of the organisation: Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 76 para 1.

2 As to the meaning of 'treaty' see PARA 71.

- 3 As to the meaning of 'negotiating state' see PARA 77 note 6.
- 4 Vienna Convention on the Law of Treaties art 76 para 1.
- 5 Vienna Convention on the Law of Treaties art 76 para 2.
- 6 Vienna Convention on the Law of Treaties art 77 para 1(a).
- 7 Vienna Convention on the Law of Treaties art 77 para 1(b).
- 8 Vienna Convention on the Law of Treaties art 77 para 1(c).
- 9 Vienna Convention on the Law of Treaties art 77 para 1(d).
- 10 Vienna Convention on the Law of Treaties art 77 para 1(e).
- 11 Vienna Convention on the Law of Treaties art 77 para 1(f).
- 12 Vienna Convention on the Law of Treaties art 77 para 1(g). As to the registration of treaties see PARA 105.
- 13 Vienna Convention on the Law of Treaties art 77 para 1(h).
- 14 Vienna Convention on the Law of Treaties art 77 para 2.



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### **105. Registration of treaties.**

The Charter of the United Nations<sup>1</sup> provides that every treaty<sup>2</sup> and every international agreement entered into by any member of the United Nations must be registered with the secretariat and published by it<sup>3</sup>, and that no party to any treaty or agreement not so registered may invoke it before any organ of the United Nations<sup>4</sup>.

1 The Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015).

2 As to treaties see PARA 71.

3 Charter of the United Nations art 102 para 1. See generally Cadell, 'Treaties, Registration and Publication', *Max Planck Encyclopaedia of Public International Law*; and Aust *Modern Treaty Law and Practice* (2nd Edn, 2007) Ch 19.

4 Charter of the United Nations art 102 para 2. See also the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmd 7964) art 80. The organs of the United Nations include the International Court of Justice (Charter of the United Nations art 7). As to the International Court of Justice see PARA 499 et seq. In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility)* ICJ Reports 1994, 112 the ICJ observed that an international agreement or treaty that has not been registered with the Secretariat of the United Nations may not, according to the provisions of article 102 of the Charter of the United Nations, be invoked by the parties before any organ of the United Nations, but also found that non-registration, or late registration, does not have any consequence for the actual validity of an agreement, which remains no less binding upon the parties, and it further took full account in its reasoning of a double exchange of letters that both parties agreed constituted an international agreement, although that agreement had not been registered. In the Covenant of the League of Nations (Versailles, 28 June 1919; TS 4 (1919); Cmd 153) art 18 stipulated that no treaty should be binding until registered. The Permanent Court of International Justice, however, did not regard unregistered treaties as not being in force: *Mavrommatis Palestine Concessions* PCIJ Ser A No 2 (1924); *Polish Postal Service in Danzig Case* PCIJ Ser B No 11 (1925).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(6) TERMINATION OF TREATIES/106. Termination in accordance with the treaty or by consent.

## (6) TERMINATION OF TREATIES

### 106. Termination in accordance with the treaty or by consent.

The termination of a treaty<sup>1</sup> or the withdrawal of a party may take place in conformity with the provisions of the treaty<sup>2</sup> or, at any time, by consent of all the parties after consultation with the other contracting states<sup>3</sup>. Thus, a treaty concluded for a certain time will terminate when that period expires; equally, if there is a clause permitting a party to denounce the treaty or to withdraw from it, denunciation or withdrawal in accordance with that clause will produce a termination of the treaty obligations for the party concerned. If there is no such clause, a treaty is not subject to denunciation or withdrawal unless: (1) it is established that the parties intended to admit the possibility of denunciation or withdrawal<sup>4</sup>; or (2) a right of denunciation or withdrawal may be implied by the nature of the treaty<sup>5</sup>.

1 Termination of a treaty denotes that it ceases altogether to be binding. As to suspension of the operation of a treaty see the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) arts 57, 58; and as to the consequences of suspension see art 72.

The termination of a treaty does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination: see art 70(1)(b). As to the consequences of termination generally see art 70. It follows from the binding nature of a treaty that it is not subject to unilateral denunciation except in the cases discussed in the following paragraphs: see PARAS 107-110. See generally 1 Oppenheim's International Law (9th Edn) pp 1296-1311; also Aust's Modern Treaty Law and Practice (2nd Edn, 2008) pp 277-311. As to the meaning of 'treaty' see PARA 71.

2 Vienna Convention on the Law of Treaties art 54(a). The Convention also contains a rule that, unless it otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force: see art 55.

3 Vienna Convention on the Law of Treaties art 54(b). A subsequent agreement may also impliedly terminate an earlier treaty. The Convention contains a rule that a treaty is considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and (1) it appears from the later treaty or is otherwise established that the parties intended the matter to be governed by that treaty; or (2) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time: see art 59 para 1. Mutual non-compliance with a treaty as opposed to mutual consent to its termination does not terminate the treaty: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 68.

4 Vienna Convention on the Law of Treaties art 56 para 1(a).

5 Vienna Convention on the Law of Treaties art 56 para 1(b). By way of a practical application of art 56 para 1 see the UN Human Rights Committee ('HRC'), CCPR General Comment No 26: *Continuity of Obligations*, 8 December 1997, CCPR/C/21/Rev 1/Add 8/Rev 1, concluding that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation, and that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. A party must give not less than 12 months' notice of its intention to denounce or withdraw from a treaty under these provisions: art 56 para 2. As to the requirement of a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity see *Interpretation of the Agreement of 25 March 1951 between the World Health Organisation and Egypt (Advisory Opinion)* ICJ Reports 1980, 73 at 96; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* ICJ Reports 1984, 392 at 420. The United Kingdom denounced numerous anti-slave trade treaties after the 1914-18 war, the mischief aimed at having long been removed. It may be suggested that in the case of very ancient treaties, certain provisions might be terminated through having become meaningless. For a discussion of obsolescence in relation to treaties see *Nuclear Tests (Australia v France)* ICJ Reports 1974, 253 at 337 (Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Arechaga and Sir Humphrey Waldock). See also the Commentary of the International Law Commission, YILC 1966, vol II, 237 ('while 'obsolescence' or 'desuetude' may be a factual

cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty').

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(6) TERMINATION OF TREATIES/107. Breach of treaty.

### 107. Breach of treaty.

A material breach of a bilateral treaty<sup>1</sup> by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty<sup>2</sup>. A material breach of a multilateral treaty by one of the parties has more complex consequences with regard to a party's option to terminate<sup>3</sup>. Thus breach of a treaty does not automatically terminate it. A material breach of a treaty<sup>4</sup> consists in: (1) an unsanctioned repudiation of the treaty<sup>5</sup>; or (2) the violation of a provision essential to the accomplishment of the object or purpose of the treaty<sup>6</sup>. These rules do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties<sup>7</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 See the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 60 para 1. Such a breach also permits the innocent party to suspend the operation of the treaty in whole or in part: art 60 para 1. As to the customary nature of the principles set out in arts 60-62 of the Convention see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 38. The provisions of the Vienna Convention on the Law of Treaties art 60 paras 1-3 are without prejudice to any provision in the treaty applicable in the event of a breach: see art 60 para 4.

3 As to the elaborate rules regarding the consequences of a material breach of a multilateral treaty by one of the parties to it see the Vienna Convention on the Law of Treaties art 60 para 2. See also note 2.

4 le for the purposes of the Vienna Convention on the Law of Treaties.

5 Vienna Convention on the Law of Treaties art 60 para 3(a). For these purposes unsanctioned implies unsanctioned by the present Convention. See also note 2.

6 Vienna Convention on the Law of Treaties art 60 para 3(b). See also note 2. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* ICJ Reports 1971, 16 at 47 in respect of South African violations of the Mandate for South West Africa and the consequent termination of the Mandate by the United Nations General Assembly. Support for the distinction between material and non-material breaches is to be found in the *Tacna-Arica Arbitration* 2 RIAA 921 (1925). The material breach must be of the treaty itself. Violation of the provisions of other treaties or rules of general international law does not constitute a ground for termination of the treaty: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 65. As to a premature termination in circumstances where the breach in question had not yet occurred: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 66.

7 Vienna Convention on the Law of Treaties art 60 para 5. The types of treaty covered by art 60 para 5 are exemplified by the Geneva Red Cross Conventions: see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 421. Further, a state may lose the right to terminate a treaty because of a material breach by another party if it has expressly agreed that the treaty remains in force or continues in operation, or has acquiesced in its maintenance in force or its operation: see the Vienna Convention on the Law of Treaties art 45.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(6) TERMINATION OF TREATIES/108. Supervening impossibility and fundamental change of circumstances.

### 108. Supervening impossibility and fundamental change of circumstances.

A party may invoke the impossibility of performing a treaty<sup>1</sup> as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty<sup>2</sup>. This ground may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either under the treaty or of any other international obligation owed to any other party to the treaty<sup>3</sup>.

A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (1) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty<sup>4</sup>; and (2) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty<sup>5</sup>. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary<sup>6</sup>; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty<sup>7</sup>.

1 As to the meaning of 'treaty' see PARA 71.

2 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 61 para 1. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty: art 61 para 1. Examples might be the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation indispensable for the execution of a treaty: see YILC 1966 vol II, 256. A state of necessity is not a ground for termination, though the treaty may be ineffective so long as the state of necessity continues to exist: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 63; and the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') arts 25, 27, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); and PARAS 362, 368. With respect to force majeure and distress, which are to be distinguished from situations of impossibility, see ARSIWA arts 23-24, 27 (and PARAS 362, 366-367); and *Rainbow Warrior Arbitration* (1990) 82 Int LR 499. For a recent application of the Vienna Convention on the Law of Treaties art 61 para 1 in the English courts see *R (on the application of Kibris Türk Hava Yollari CTA Holidays) v Secretary of State for Transport (Republic of Cyprus intervening)* [2009] EWHC 1918 (Admin), [2009] All ER (D) 295 (Jul) at [59]-[62]. As to defences to liability see PARA 362.

3 Vienna Convention on the Law of Treaties art 61 para 2.

4 Vienna Convention on the Law of Treaties art 62 para 1(a). As to consent to be bound see PARA 76.

5 Vienna Convention on the Law of Treaties art 62 para 1(b). A fundamental change of circumstances may also be invoked as a ground for suspending the operation of a treaty: art 62 para 3. The plea that an unforeseen and fundamental change of circumstances (known in customary international law as *rebus sic stantibus*) has had the effect of terminating a treaty obligation has never been successfully advanced before an international tribunal, so that the precise operation of the plea remains uncertain. The doctrine was invoked in *Tunis and Morocco Nationality Decrees (Advisory Opinion)* PCIJ Ser B No 4, at 29 (1923), but the court did not find it necessary to pronounce upon it. In the *Free Zones of Upper Savoy and the District of Gex Case* PCIJ Ser A/B No 46 (1932) the argument failed on the facts, although the court appeared to acknowledge the doctrine. In the *Fisheries Jurisdiction (United Kingdom v Iceland) (Jurisdiction of the Court)* ICJ Reports 1973, 3 at 17, 18; and in the *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) Judgment* ICJ Reports 1997, 7, the court referred to the Vienna Convention on the Law of Treaties art 62 stating that it represented customary international law, but held that no fundamental change had been established. See in particular the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 65 where the International Court of Justice emphasised that the stability of treaty relations requires that the plea of fundamental change of circumstances

be applied only in exceptional cases. See also Case C-162/96 *Racke (A) GmbH & Co v Hauptzollamt Mainz* [1998] ECR I-3655, [1998] 3 CMLR 219.

The Convention contains the rule that the severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by a treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty: see art 63. The Convention also provides that if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates: see art 64. See also arts 53, 71; and PARA 105.

6 Vienna Convention on the Law of Treaties art 62 para 2(a).

7 Vienna Convention on the Law of Treaties art 62 para 2(b). A state may not invoke this ground for terminating, withdrawing from or suspending a treaty if it has expressly agreed that the treaty remains in force or continues in operation, or acquiesces in the maintenance in force of the treaty or its operation: see art 45.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(6) TERMINATION OF TREATIES/109. Procedure in respect of invalidity, termination, withdrawal or suspension.

### **109. Procedure in respect of invalidity, termination, withdrawal or suspension.**

A state which invokes<sup>1</sup> either a defect in its consent to be bound<sup>2</sup> by a treaty<sup>3</sup> or a ground for impeaching the validity of a treaty<sup>4</sup>, terminating it<sup>5</sup>, withdrawing from it or suspending its operation must notify the other parties of its claim, and indicate in the notification the measure proposed to be taken with respect to the treaty and the reasons therefore<sup>6</sup>. Except in cases of special urgency the period of notice thereof must be at least three months, upon which the proposed measure may be implemented provided no objection to it has been raised<sup>7</sup>. Should another party to the treaty raise an objection, the parties must seek a solution through peaceful means<sup>8</sup>.

1     I.e. under the provisions of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmd 7964).

2     As to consent to be bound see PARA 76.

3     As to the meaning of 'treaty' see PARA 71.

4     As to the invalidity of treaties see PARA 101 et seq.

5     As to the termination of treaties see PARA 106 et seq.

6     Vienna Convention on the Law of Treaties art 65 para 1. Without prejudice to art 45 (see PARA 101 note 4) the fact that a state has not previously made the notification so prescribed does not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation: art 65 para 5. As to the instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty see art 67. Nothing in art 65 paras 1-3 affects the rights or obligations of the parties concerned under any provisions in force binding the parties with regard to the settlement of disputes: see art 65 para 4.

7     Vienna Convention on the Law of Treaties art 65 para 2. Customary international law requires 'reasonable notice': *Interpretation of the Agreement of 25 March 1951 between the World Health Organisation and Egypt (Advisory Opinion)* ICJ Reports 1980, 73 at 96. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* ICJ Reports 1984, 392 at 420. As to proportionate counter-measures against a party which is in breach of a treaty see *Air Services Arbitration* (1978) 54 Int LR 306; and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 66. See also the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 22, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2).

8     Vienna Convention on the Law of Treaties art 65 para 3 (which refers to the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 33). If, under art 65 para 3, no solution is reached within 12 months of the objection being raised, provision is made for judicial settlement, arbitration and conciliation: see art 66.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/6. TREATIES AND INTERNATIONAL AGREEMENTS/(6) TERMINATION OF TREATIES/110. Legal effects of unilateral acts.

**110. Legal effects of unilateral acts.**

A unilateral statement or promise made by a state, which the state intends to be binding on itself, though it does not constitute a treaty, will impose a legal obligation upon it<sup>1</sup>. International law has no requirement of consideration<sup>2</sup>.

1 *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53 (1933); *Nuclear Tests (Australia v France)* ICJ Reports 1974, 253 at 267. See, however, *Frontier Dispute (Burkina Faso/Republic of Mali)* ICJ Reports 1986, 554 at 573-574, emphasising that all depends on the intention of the State in question. See generally 1 Oppenheim's International Law (9th Edn) pp 1187-1196.

2 As to consideration generally see **CONTRACT** vol 9(1) (Reissue) PARA 727 et seq.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/7. TERRITORY/111. Nature and extent of title to territory.

## 7. TERRITORY

### 111. Nature and extent of title to territory.

Territory is a central component of the state, and its protection a vital aid to stability in international relations. A state must be able to demonstrate title to its territory, which in practice means that it has a better claim than any other state<sup>1</sup>. Where title is established, the state enjoys protection of its rights by the principle of territorial integrity<sup>2</sup> and of its right to act according to its own decisions within its territory by the principle of non-intervention<sup>3</sup>. Title to territory may not be changed by resort to the use of armed force<sup>4</sup>.

Territory is not simply a two-dimensional land area: states with coastlines have a band of territorial waters over which they enjoy sovereignty<sup>5</sup>, and states have sovereignty over the airspace over the whole of their territory up to the limit of outer space<sup>6</sup>.

1 As to disputes about title see PARA 114.

2 The Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) forbids the use or threat of force against the territorial integrity of any state: see art 2 para 4.

3 I.e. 'the rights of every sovereign state to conduct its affairs without outside interference': see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Reports 1986, 14 at 106. See also *Corfu Channel (United Kingdom v Albania)* ICJ Reports 1949, 4 at 35. The International Court of Justice (the 'ICJ') has recognised the principle of non-intervention as part of customary international law: see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Reports 1986, 14. See also *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* ICJ Reports, 19 December 2005 (paras 161-165).

4 See PARA 113 et seq.

5 See PARA 123 et seq.

6 See PARA 207 et seq.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/7. TERRITORY/112. The territory of the United Kingdom.

## **112. The territory of the United Kingdom.**

The territory of the United Kingdom as an international personality<sup>1</sup> consists of England, Wales, Scotland, Northern Ireland<sup>2</sup>, the British Islands<sup>3</sup> and the British overseas territories<sup>4</sup>.

There are no territorial disputes with other states about title to the territory of the United Kingdom itself<sup>5</sup> or the British Islands, but dispute remains over the titles to the Falklands Islands<sup>6</sup> and Gibraltar<sup>7</sup>.

1 As to international personality see PARA 32.

2 See the Northern Ireland Act 1998 s 1(1); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 The United Kingdom, the Isle of Man and the Channel Islands together make up the British Islands: see **COMMONWEALTH** vol 13 (2009) PARAS 790, 799.

4 See generally **COMMONWEALTH** vol 13 (2009) PARA 801 et seq. All the British overseas territories are regarded as non-self-governing territories by the UN but the UK takes the view that they all should be removed from UN supervision because of the modernisation of the relationships between the UK and each overseas territory.

5 As to the possession of the Island of Rockall see PARA 115 note 3. There are, however, disputes over certain sea areas adjacent to the United Kingdom: see PARA 114.

6 For a recent statement regarding the dispute with Argentina over title to the Falklands Islands see the FCO letter to the Foreign Affairs Committee: *Foreign Affairs Committee, Written Evidence, Miscellaneous Matters* (HC Paper 1329 (2006)) no 12.

7 As to the dispute with Spain over title to Gibraltar see 450 HC Official Report (5th Series), 17 October 2006 cols 47-48WS; and the 'Cordoba Ministerial Trilateral Forum Communiqué'. See also **COMMONWEALTH** vol 13 (2009) PARA 859.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/7. TERRITORY/113. Acquisition and disposal of territory.

### **113. Acquisition and disposal of territory.**

In the exercise of the foreign affairs prerogative, the government may acquire and dispose of territory and may fix the frontiers of British territory<sup>1</sup>. As a matter of practice, when title to territory is surrendered, it is done so pursuant to an Act of Parliament<sup>2</sup>. When independence has been granted to British colonial territories, it has been accompanied by an Act of Parliament<sup>3</sup>.

1 See generally **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 3.

2 A practice that commenced with surrender of Heligoland to Germany: see the Anglo-German Agreement Act 1890; and PARA 28.

3 See eg the Zimbabwe Act 1979 (and **COMMONWEALTH** vol 13 (2009) PARA 734).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/7. TERRITORY/114. Disputes about territorial title.

**114. Disputes about territorial title.**

In determining disputes between states about title to territory, two principles must be borne in mind.

- 25 (1) The critical date. In many territorial disputes, there will be time by which the dispute between the contending states has crystallised and the dispute must be resolved according to the facts and law established to that time. The typical example is where there has been an agreement between states which purports to settle the question of title. This principle is intended to prevent the parties seeking to improve their legal positions by actions after the critical date<sup>1</sup>.
- 26 (2) The intertemporal law. In assessing the legal value to be attached to facts relating to title to territory, account must be taken of the state of international law as it was at the time the facts occurred<sup>2</sup>. However, in interpreting treaties which bear on matters of title, it may be necessary to take into account international law as it is at the time of interpretation, especially with respect to legal (sometimes called 'generic') terms, the understanding of which may have changed over time<sup>3</sup>.

1 *Island of Palmas Case* 2 RIAA 829 (1928).

2 *Island of Palmas Case* 2 RIAA 829 (1928).

3 *Aegean Sea Continental Shelf (Greece v Turkey)* ICJ Reports 1978, 3. As to the interpretation of treaties see PARA 95 et seq.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/7. TERRITORY/115. Acquisition by occupation.

### **115. Acquisition by occupation.**

Land territory which is unoccupied may become part of a state through occupation<sup>1</sup>. In order to acquire title to territory it is not enough that the state's agents have discovered the territory<sup>2</sup>. Discovery and a formal declaration of possession may constitute a root of title<sup>3</sup>, but such title must be perfected by acts of effective occupation<sup>4</sup>. A state must continuously and peaceably administer the territory<sup>5</sup>. The extent of the authority which must be asserted and the area over which administration is exercised depend upon the circumstances, and in particular the physical characteristics, of the territory in question<sup>6</sup>. It is clear that while there is little or no unoccupied territory today, occupation as a mode of acquisition remains an historically important source of present title<sup>7</sup>. Sovereignty may be lost by abandonment, namely by failure to exercise state authority over the territory in question with the intention to abandon it<sup>8</sup>.

1 Title can only be acquired by occupation over territory which is *res nullius*; it cannot therefore be acquired thus over sea areas, since the high seas are not *res nullius* but *res communis* (ie belonging to all states). However, rights in sea areas may be acquired by a state in other ways than by occupation, eg by prescription: see PARA 118. As to the status of the high seas generally see PARA 147 et seq; and as to the status of Antarctica see PARA 218. For a discussion of the modes of acquisition of territory generally see Jennings's *Acquisition of Territory in International Law*.

2 *Island of Palmas Case* 2 RIAA 829 (1928). The independent activity of private individuals is of little value in this connection unless it can be shown that they have acted in pursuance of a licence or some other authority received from their governments or that in some other way their governments have asserted jurisdiction through them: *Fisheries (United Kingdom v Norway)* ICJ Reports 1951, 116 at 184 per Judge McNair. See, however, PARA 118 note 2.

3 Possession of the island of Rockall was taken in the name of Her Majesty on 18 September 1955 in pursuance of a Royal Warrant dated 14 September 1955, addressed to the captain of Her Majesty's ship *Vidal*: see the *Island of Rockall Act 1972* s 1, which provided for the incorporation of the island into that part of the United Kingdom known as Scotland and for it to form part of the District of Harris in the County of Inverness, the law of Scotland applying accordingly.

4 *Island of Palmas Case* 2 RIAA 829 (1928). See also PARA 119.

5 *Island of Palmas Case* 2 RIAA 829 (1928).

6 *Island of Palmas Case* 2 RIAA 829 (1928); *Clipperton Island Case* 2 RIAA 1105 (1931) (remote guano island); *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53 (1933) (sparse population along the coast and a vast unpopulated hinterland). In most cases there have been two competing claims and the tribunal has been satisfied with very little in the way of exercise of sovereign rights provided that the other state could not make out a superior claim: *Legal Status of Eastern Greenland* at 46.

7 *Western Sahara (Advisory Opinion)* ICJ Reports 1975, 12 at 80 (by the 1880s at the latest territory inhabited by tribes or peoples having a social and political organisation was not regarded as *terra nullius*).

8 *Clipperton Island Case* 2 RIAA 1105 at 1110-1111 (1931).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/7. TERRITORY/116. Acquisition by accretion.

**116. Acquisition by accretion.**

Title to territory may be acquired by accretion, namely by addition to its existing territory by reason of natural changes, as where an island arises within the internal or territorial sea<sup>1</sup> of a state<sup>2</sup> or where the bed of a river forming the boundary between states shifts imperceptibly by land which has left one bank of the river being added to the other<sup>3</sup>.

1 As to the territorial sea see PARA 123 et seq.

2 *The Anna* (1805) 5 Ch Rob 373, 2 BILC 694; *Secretary of State for India v Chelikani Rama Rao* (1916) LR 43 Ind App 192, 2 BILC 841, PC.

3 Thus it may have the effect of causing the boundary to alter. Accretion is distinguished from avulsion, the term given to the case where a river suddenly and violently changes its course, in which case the boundary retains its original line: see *Chamizal Arbitration* 11 RIAA 316 (1910).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/7. TERRITORY/117. Acquisition by cession.

### 117. Acquisition by cession.

Title to territory may be acquired by cession, namely by the peaceful transfer by one state to another of sovereignty over the territory, usually by treaty, or by way of gift, purchase or exchange. A treaty of cession is followed by the handing over of the territory, or tradition<sup>1</sup>. Cession depends upon the agreement of the states concerned<sup>2</sup>. Formerly, conquest followed by annexation with or without a treaty of cession gave good title to territory<sup>3</sup>. In that this is a consequence of the use of force by one state against another, it cannot now be considered as a legal method of acquisition of title to territory<sup>4</sup>.

1 It is controversial, however, whether the transfer of sovereignty takes place at the time of effective transfer of authority to the transferee state (ie at the time of tradition) or whether this occurs when the treaty enters into force. If the latter is the case, the transferee state would be able lawfully to alienate the territory to a third state without itself taking actual possession of it: see 1 Oppenheim's International Law (9th Edn) 683. Traditio was not regarded as essential in *Award between Colombia and Venezuela* 1 RIAA 223 (1922). See also the Joint Declaration of the Governments of the United Kingdom and the People's Republic of China on the Question of Hong Kong dated 19 December 1984 (TS No 26 (1985); Cmnd 9543) (and **COMMONWEALTH** vol 13 (2009) PARA 727), by which, inter alia, the United Kingdom ceded the territory of Hong Kong to the People's Republic of China.

2 Cf secession or the creation of new states. There is no right of secession in international law and even acts of effective secession may not create new states because of their impact on the application of the principle of self-determination to the territory eg the claim to statehood of Somaliland (see 443 HC Official Reports (5th series), 8 May 2006, col 1568W; and 450 HC Official Reports (5th Series), 24 October 2006, col 1777W). In the case of secession, the acquisition of title depends upon achieving effective independence by the seceding entity; and in the case of independence, the acquisition of title depends on the unilateral act of the state granting independence.

3 This is true of treaties of peace, eg at the end of the 1914-18 war. The conqueror, however, only acquired sovereignty over the territory of the conquered state if he intended to do so. Thus in 1945 the United Nations expressly disclaimed the intention of annexing Germany: see Jennings 'Government in Commission' 23 BYIL 112.

4 The use or threat of force is forbidden under international law: see the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 2 para 4; and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, principle 1, General Assembly Resolution 2625 (XXV) of 24 October 1970. See also the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') arts 40, 41 (in particular art 41(2)), International Law Commission Report, 53rd Session, A/56/10, YILC 2001, vol II(2); and PARA 382. In 1967 the Security Council of the United Nations passed a resolution on the Middle East calling for a withdrawal of Israel from occupied territories and emphasising the inadmissibility of the acquisition of territory by war: Security Council Resolution 242 (XXII) of 2 November 1967. See also Security Council Resolution 662 of 9 August 1990 (incorporation of the territory of Kuwait into Iraq).

Under the law of the Charter of the United Nations, it appears that neither the sovereign dispossessed by force nor other states may lawfully recognise the title of the aggressor: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, principle 1, General Assembly Resolution 2625 (XXV) of 24 October 1970. Peace treaties imposed by force are void: see the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 52; and PARA 105. The principle of non-acquisition applies whether or not a state originally resorted to force lawfully. A state using force to take control of the territory of another state becomes the belligerent occupant of territory, its powers limited by international law: see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 573; and the UK Ministry of Defence *Manual of the Law of Armed Conflict* (2004) Ch 10. Providing that a certain degree of control is acquired by the occupant, it may also be subject to duties under human rights treaties: see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 573.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/7. TERRITORY/118. Acquisition by prescription.

### **118. Acquisition by prescription.**

Prescription<sup>1</sup> denotes the acquisition of title to territory by means of de facto exercise of state authority in the mistaken belief that it is part of the territory of the state which is prescribing for it<sup>2</sup>. The exercise of authority must be undisturbed and not protested against by the state against which it is exercised<sup>3</sup>. It is possible to acquire rights in the high seas by prescription<sup>4</sup>.

The period of time which must elapse before title is acquired by prescription is not fixed by international law, although it seems clear that the running of some time is necessary<sup>5</sup>.

1 Prescription in this sense is acquisitive prescription as opposed to extinctive prescription which may result in the barring of state claims by lapse of time: see PARA 93. It is distinguishable from occupation (see PARA 115) by reason of its being concerned with territory which is not res nullius. However, in some cases (eg *Island of Palmas Case* 2 RIAA 829 (1928); and *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53 (1933)) it is not clear whether they were decided upon the basis of occupation or of prescription. See also *Western Sahara (Advisory Opinion)* ICJ Reports 1975, 12. In *Kasikili/Sedudu Island (Botswana/Namibia)* ICJ Reports 1999, 1045 at 1103 (para 94), although the ICJ found the claim to title to an island on the basis of acquisitive prescription not made out, the parties agreed on the characteristics of it as a means of obtaining title.

2 When two states claim title to the same territory which was not res nullius, then, as is the case with occupation, the case will be decided upon the relative strengths of the evidence of the exercise of state authority such as local administration, legislation, registration or the holding of inquests: see the *Minquiers and Ecrehos Case (France/United Kingdom)* ICJ Reports 1953, 47 (acquisition by historic title). Any acts of non-state actors must be undertaken 'a titre de souverain' (ie consistent with sovereignty) in order to go towards establishing title by acquisitive prescription: *Kasikili/Sedudu Island (Botswana/Namibia)* ICJ Reports 1999, 1045 at 1105 (para 98). Cf *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* ICJ Reports, 13 July 2009, where the Court held that Nicaragua was bound by a right of subsistence fishing established by the practices of the local population, to which Nicaragua had not objected.

3 *Island of Palmas Case* 2 RIAA 829 (1928) at 868 (absence of protests by Spain against Dutch acts). As to acquiescence and recognition in respect of the acquisition of territory see also *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53 (1933); *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* ICJ Reports 1962, 6. See also PARA 119.

4 Eg as in the case of historic bays: see PARA 131.

5 Under the British Guiana-Venezuela Boundary Arbitration Agreement 1899 adverse holding or prescription during a period of 50 years was to make a good title: see 92 BFSP 160.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/7. TERRITORY/119. Effective control.

### **119. Effective control.**

Consolidating title gained by occupation<sup>1</sup>, gaining title by prescription<sup>2</sup> and demonstrating title where the original title is obscure<sup>3</sup> have overlapping characteristics. A state is required to show its effective control over the area, the kind and degree of effectiveness ('effectivites') being dependent upon the nature of the territory and its geographical location. What is more, there is an obligation on states to maintain their title by demonstrating continuing acts of governmental authority with respect to the title. Where title is contested between two states, it will often be the case that the one which shows the greater degree of activity will be the one to be entitled to sovereignty over the territory, however little that might be<sup>4</sup>. The activities, evidence of which will contribute to establishing title, are the exercise of sovereign functions with respect to the contested area and people present there<sup>5</sup>.

1 See PARA 115.

2 See PARA 118.

3 For an example of obscurity of original title, see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* ICJ Reports, 8 October 2007.

4 *Minquiers and Ecrehos Case (France/United Kingdom)* ICJ Reports 1953, 47.

5 *Island of Palmas Case 2* RIAA 829 at 840 (1928); *Eritrea-Yemen Arbitration (First Stage: Territorial Sovereignty and Scope of Dispute)* (9 October 1998) (1998) 12 RIAA 209, (2001) 40 ILM 900; but see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* ICJ Reports, 8 October 2007.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/7. TERRITORY/120. Acquisition by creation of new states.

**120. Acquisition by creation of new states.**

When states agree to create a new state from the territory of one or more of them<sup>1</sup>, the new state's title to its territory is derived from the legal act which created it<sup>2</sup>. This is also true of cases where colonial territories become independent from the mother country and acquire title by the act of independence<sup>3</sup>.

1 Examples include the creation of Belgium in 1839, and the creation by agreement of the states of the Czech Republic and Slovakia on the territory of what had been Czechoslovakia in 1993. It is necessary that the previous title be clear and that the previous sovereign consents to the creation of the new state.

2 This case is distinguishable from cession, since there is no state to which the territory is transferred, and from secession, which requires a voluntary act on the part of the entity which has become the new state. As to cession and secession see PARA 117.

3 As to state succession in respect of boundaries and the doctrine of uti possidetis see PARA 59. As to the Acts granting independence in the case of former British colonial territories see **COMMONWEALTH** vol 13 (2009) PARA 720.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/121. Internal waters.

## 8. LAW OF THE SEA

### (1) INTERNAL WATERS AND THE TERRITORIAL SEA

#### 121. Internal waters.

Internal or national waters are those areas of water, including parts of the sea, which are under the full sovereignty of the territorial state. They consist of all the waters that lie landward of the baselines from which the territorial sea<sup>1</sup> is delimited<sup>2</sup>, and include inland waters, ports, and certain estuaries and bays<sup>3</sup>. Internal waters differ from territorial waters in that there exists in territorial waters, but not in internal waters, a right of innocent passage for foreign vessels<sup>4</sup>. Foreign warships require specific permission to enter internal waters. While maritime ports are in practice ordinarily open to foreign merchant vessels, there is no general legal right for foreign ships to enter them, and entry to them is conditional upon compliance with conditions determined by the territorial state<sup>5</sup>. Exceptionally, ships in distress have a general right to enter maritime ports in order to save the lives of those on board; but it is probable that no such right is exercisable in order to save the ship or its cargo<sup>6</sup>.

1 As to baselines see PARA 125 et seq. As to the territorial sea see PARA 123 et seq.

2 See the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 8; and PARA 125 et seq. The United Kingdom became a party on 24 August 1997: see the London Gazette 29 August 1997. The Convention supersedes the Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958; TS 3 (1965); Cmnd 2511). The latter remains in force between the United Kingdom and other states which are parties to it but not to the United Nations Convention. As to the delimitation of the territorial sea see PARAS 125-126.

3 See the United Nations Convention on the Law of the Sea art 8. Special provisions apply to certain archipelagic states: see Part IV of the Convention. The United Kingdom is not an archipelagic state for these purposes.

4 As to the right of innocent passage see PARA 134 et seq; but see the United Nations Convention on the Law of the Sea art 8 para 2, which provides that where the establishment of straight baselines encloses as internal waters areas of the sea which had previously been part of the territorial sea or of the high seas, the right of innocent passage exists in those waters.

5 See 432 HL Official Report (5th series) 29 June 1982, col 156 per Lord Lyell; (1982) 53 BYIL 468-469. See, however, the Convention and Statute on the International Regime of Maritime Ports (Geneva, 9 December 1923; TS 24 (1925); Cmd 2419), to which the United Kingdom is a party, which provides for national treatment on a reciprocal basis for the merchant ships of each other state in ports (art 2), and includes reservations concerning immigration (art 12), quarantine (art 17) and belligerency (art 18). The regime of navigation in internal waters may be prescribed by the local state, which may reserve to itself cabotage or coastal trade and the right to reserve the exploitation of internal waters to itself and its nationals: see generally *Saudi Arabia v Arabian American Oil Co (Aramco) Arbitration* (1958) 27 Int LR 117. Access to ports may be guaranteed by bilateral treaties. See eg the Treaty of Commerce, Establishment and Navigation between the United Kingdom and Iran (Teheran, 11 March 1959; Iran 1 (1959); Cmnd 698). See also the Convention on Facilitation of International Maritime Traffic (London, 9 April 1965; TS 46 (1967); Cmnd 3299).

6 See *ACT Shipping (PTE) Ltd v Minister for the Marine* [1995] 3 IR 406.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/122. Jurisdiction in internal waters.

## 122. Jurisdiction in internal waters.

The territorial state has jurisdiction over foreign merchant vessels<sup>1</sup> in its internal waters and over crimes committed on board such vessels. It may arrest persons on board foreign ships in internal waters<sup>2</sup>. In practice, jurisdiction is not exercised unless the consequences of the crime extend to the territorial state or the crime is serious or the assistance of the local authorities is sought by the master of the ship or by the flag state<sup>3</sup>. United Kingdom courts may by Order in Council be barred from entertaining without the consent of the flag state proceedings in respect of crimes on board foreign ships, unless the crime is committed by or against a British national or is punishable by more than five years imprisonment or falls within certain categories designated in the Order<sup>4</sup>.

Foreign vessels which enter ports in distress are exempt from penalties to which they would have been liable had they entered voluntarily, but have no general immunity from the jurisdiction of the territorial state<sup>5</sup>. The jurisdiction of the territorial state is concurrent with that of the flag state of the vessel<sup>6</sup>.

Under United Kingdom law, a member of the crew of a ship belonging to a state designated for the purpose by Order in Council<sup>7</sup> who is detained in custody on board for a disciplinary offence is not to be deemed to be unlawfully detained unless (1) his detention is unlawful under the laws of that state or the conditions of detention are inhumane or unjustifiably severe<sup>8</sup>; or (2) there is reasonable cause for believing that his life or liberty will be endangered for reasons of race, nationality, political opinion or religion in any country to which the ship is likely to go<sup>9</sup>.

1 For the position of foreign warships and public ships, which enjoy immunity from the jurisdiction, see *The Schooner Exchange v McFaddon* 7 Cranch 116, US SC (1812). The immunity may be waived: *Chung Chi Cheung v R* [1939] AC 160, [1938] 4 All ER 786, 3 BILC 96, PC.

2 *R v Garrett, ex p Sharf* [1917] 2 KB 99, 5 BILC 95, CA (arrest on Danish ship for offences against the Defence of the Realm Acts). In certain cases proceedings for offences committed on board a foreign vessel by the master or a member of the crew may not be commenced without the request or consent of the consul of the flag state: see the Consular Relations Act 1968 s 5; PARA 303; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1054. Extradition law extends on board, so British police may arrest a person on board a foreign ship which is in a British port for extradition to a third state: *Case of Eisler* (1949) 26 BYIL 468. As to civil jurisdiction and the application of the local law to transactions and events on board see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 372.

3 Cf United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmdr 4524) art 27 for a similar rule applicable as a matter of law to foreign ships in the territorial sea.

4 See the Consular Relations Act 1968 s 5; and PARA 303.

5 See *Cashin v Canada* [1935] Ex C R 103. As to the meaning of 'distress' see *ACT Shipping (PTE) Ltd v Minister for the Marine* [1995] 3 IR 406.

6 *R v Anderson* (1868) LR 1 CCR 161, 3 BILC 40. As to the jurisdiction of English courts over crimes committed on British merchant ships in foreign waters see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1057.

7 For Orders in Council designating states for this purpose see PARA 303 note 6.

8 Consular Relations Act 1968 s 6(a).

9 Consular Relations Act 1968 s 6(b).



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/123. The territorial sea.

### **123. The territorial sea.**

The United Kingdom is a party to the United Nations Convention on the Law of the Sea<sup>1</sup>. Part II of this Convention, which reflects the rules of customary international law<sup>2</sup>, stipulates that the sovereignty of a state extends beyond its land territory and its internal waters to an adjacent belt of sea, described as the territorial sea<sup>3</sup>. The sovereignty of the coastal state extends to the air space over the territorial sea as well as to its bed and subsoil<sup>4</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) Pt II (arts 2-33) contains provisions concerning the territorial sea.

2 For the view that the territorial sea is an inseparable appurtenance of land territory see *Grisbadarna Arbitration, Permanent Court of Arbitration* 11 RIAA 147 (1909).

3 United Nations Convention on the Law of the Sea art 2 para 1. The sovereignty of the coastal state is exercised subject to the rules set out in the Convention (eg the right of innocent passage: see PARA 133 et seq) and other rules of international law (eg sovereign and diplomatic immunity: see PARAS 243, 266): art 2 para 3.

4 See the United Nations Convention on the Law of the Sea art 2 para 2.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/124. Breadth of territorial sea.

#### **124. Breadth of territorial sea.**

A state may establish the breadth of its territorial sea<sup>1</sup> up to a limit not exceeding 12 nautical miles from its baselines<sup>2</sup>. The territorial sea of the United Kingdom extends up to 12 nautical miles<sup>3</sup>, measured from the baselines established by Order in Council, unless otherwise provided<sup>4</sup>. Her Majesty may, for the purpose of implementing any international agreement or otherwise, by Order in Council provide that any part of the territorial sea adjacent to the United Kingdom is to extend to such other line as may be specified in the Order<sup>5</sup>.

1 As to the territorial sea see PARA 123 et seq.

2 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 3. As to baselines see PARA 125 et seq. Roadsteads normally used for the loading, unloading and anchoring of ships and which would be otherwise situated wholly or partly outside the outer limit of the territorial sea are included in the territorial sea: art 12. They must be demarcated and indicated on charts, to which due publicity must be given: art 6.

3 Territorial Sea Act 1987 s 1(1)(a). For the purposes of s 1, 'nautical miles' means international nautical miles of 1852 metres: s 1(7). Subject to the provisions of the Territorial Sea Act 1987, any enactment or instrument which (whether passed or made before or after 1 October 1987) contains a reference (however worded) to the territorial sea adjacent to, or to any part of, the United Kingdom is to be construed in accordance with s 1 and with any provision made, or having effect as if made, under s 1: s 1(5). Without prejudice to the Territorial Sea Act 1987 s 1(5) (see PARA 124), in relation to a reference to the baselines from which the breadth of the territorial sea adjacent to the United Kingdom is measured, nothing in s 1(5) requires any reference in any enactment or instrument to a specified distance to be construed as a reference to a distance equal to the breadth of that territorial sea: s 1(6). As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

4 See the Territorial Sea Act 1987 s 1; PARAS 125-126; and **WATER AND WATERWAYS** vol 100 (2009) PARA 31.

5 See the Territorial Sea Act 1987 s 1(2); and **WATER AND WATERWAYS** vol 100 (2009) PARA 31.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/125. Baselines for delimitation.

### 125. Baselines for delimitation.

According to the United Nations Convention on the Law of the Sea, the outer limit of the territorial sea<sup>1</sup> is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea<sup>2</sup>. The normal baseline for measuring the breadth of the territorial sea is the low-water mark along the coast, as marked on large scale charts officially recognised by the coastal state<sup>3</sup>. For the purpose of delimiting the territorial sea the outermost permanent harbour works which form an integral part of a harbour system are regarded as forming part of the coast<sup>4</sup>.

The baselines from which the breadth of the territorial sea of the United Kingdom is measured are established by Her Majesty by Order in Council<sup>5</sup>.

1 As to the territorial sea see PARA 123 et seq.

2 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 4. For the methods of constructing baselines and measuring the outer limit of the territorial sea, see United Nations, Office of Legal Affairs *Handbook on the Delimitation of Maritime Boundaries* (2000) and Office for Ocean Affairs and the Law of the Sea, United Nations *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989).

3 United Nations Convention on the Law of the Sea art 5. As to Admiralty charts as evidence in proceedings in the English courts see *Office v Estuary Radio Ltd* [1968] 2 QB 740, [1967] 3 All ER 663, 9 BILC 187, CA. As to departures from the normal rule see PARA 126.

4 United Nations Convention on the Law of the Sea art 11. Offshore installations and artificial islands are not permanent harbour works: art 11.

5 Territorial Sea Act 1987 s 1(1)(b). In any legal proceedings, a certificate issued by or under the authority of the Secretary of State stating the location of any baseline established under s 1(1) is conclusive of what is stated in the certificate: s 1(3). As to the Secretary of State see PARA 29.

As to the limits see the Territorial Waters Order in Council 1964, dated 25 September 1964 (amended by SI 1998/2564). See also the Territorial Sea (Limits) Order 1989, SI 1989/482. As from 1 October 1987, the Territorial Waters Order in Council 1964 and the Territorial Waters (Amendment) Order in Council 1979 have effect for all purposes as if they were Orders in Council made by virtue of the Territorial Sea Act 1987 s 1(1)(b): s 1(4). These Orders were initially made by virtue of the royal prerogative on 25 September 1964 and on 23 May 1979 and were not issued in the SI series. The Fishery Limits Act 1976 refers to the baselines from which the territorial sea is measured but without expressly defining them: see s 1(1); and **AGRICULTURE AND FISHERIES**. As to the meaning of 'United Kingdom' see PARA 30 note 3. As to the baselines drawn around the United Kingdom coast see United Kingdom Hydrographic Office *The Territorial Sea Limits of the United Kingdom* (2006).



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/126. Straight baselines.

## **126. Straight baselines.**

The normal low-water baseline may be departed from in localities where the coastline is deeply indented or cut into, or where there is a fringe of islands along the coast in its immediate vicinity. In such a case, a straight baseline may be drawn by joining appropriate points on the coast<sup>1</sup>. This has been done in respect of parts of the coast of Scotland<sup>2</sup>. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast<sup>3</sup>, and the sea areas lying behind the baselines must be sufficiently closely linked to the land domain to be subject to the regime of the internal waters<sup>4</sup>. In applying the technique of straight baselines, account may be taken in determining particular baselines of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage<sup>5</sup>. The system may not be applied in such a manner as to cut off from the high seas the territorial sea<sup>6</sup> or an exclusive economic zone of another state<sup>7</sup>, and the coastal state must indicate straight baselines on charts to which due publicity must be given<sup>8</sup>. Waters on the landward side of the baseline form part of the internal waters of the coastal state<sup>9</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 7 para 1. For low-tide elevations such as drying rocks and sandbanks see PARA 128.

2 The method of drawing straight baselines has been adopted in the United Kingdom with respect to the area between Cape Wrath and the Mull of Kintyre: see the Territorial Waters Order in Council, dated 25 September 1964, art 3(1), Schedule and the Territorial Waters (Amendment) Order in Council 1979, dated 23 May 1979 (substituted by SI 1998/2564).

3 United Nations Convention on the Law of the Sea art 7 para 3.

4 United Nations Convention on the Law of the Sea art 7 para 3. As to internal waters see PARA 121.

5 United Nations Convention on the Law of the Sea art 7 para 5.

6 As to the territorial sea see PARA 123 et seq.

7 United Nations Convention on the Law of the Sea art 7 para 6. As to the exclusive economic zone see PARA 154.

8 See the United Nations Convention on the Law of the Sea art 16.

9 United Nations Convention on the Law of the Sea art 8 para 1. As to internal waters see PARA 121. As to the effect of the drawing of straight baselines on the right of innocent passage see art 8 para 2; and PARA 133.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/127. Islands and rocks.

## 127. Islands and rocks.

The United Nations Convention on the Law of the Sea lays down a regime for islands<sup>1</sup>. An island is a naturally formed area of land, surrounded by water, which is above water at high tide<sup>2</sup>. An island's territorial sea<sup>3</sup>, contiguous zone<sup>4</sup>, exclusive economic zone<sup>5</sup> and continental shelf<sup>6</sup> are determined in the same way as those of other land territory<sup>7</sup>. Rocks which cannot sustain human habitation or economic life of their own are entitled to their own territorial sea and contiguous zone but not to an exclusive economic zone, exclusive fishery zone, or continental shelf<sup>8</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) Pt VIII (art 121).

2 United Nations Convention on the Law of the Sea art 121 para 1.

3 As to the territorial sea see PARA 123 et seq.

4 As to the contiguous zone see PARA 153.

5 As to the exclusive economic zone see PARA 154.

6 As to the continental shelf see PARA 163.

7 United Nations Convention on the Law of the Sea art 121 para 2.

8 United Nations Convention on the Law of the Sea art 121 para 3. In *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* ICJ Reports 1993, 38, a conciliation commission rejected the argument that Jan Mayen island was a rock under this provision. The United Kingdom appeared formerly to regard Rockall, an uninhabited rock to the west of the Hebrides, not as a rock but rather as an island, since it claimed an exclusive fishery zone around it: see the Island of Rockall Act 1972 s 1; and PARA 115. See also 924 HC Official Report (6th series) 24 January 1977, written answers col 384. However in 1997 that claim seems to have been abandoned: see 298 HC Official Report (6th series) 22 July 1997, written answers col 911. See further 298 HC Official Report (6th series) 21 July 1997, written answers col 397; the Fishery Limits Order 1997, SI 1997/1750; and **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 961.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/128. Low-tide elevations.

### **128. Low-tide elevations.**

A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide<sup>1</sup>. Where a low-tide elevation, such as a drying rock or sandbank, is situated wholly or partly at a distance not exceeding the breadth of the territorial sea<sup>2</sup> from the mainland or an island, the low-water line on that elevation may be used as the baseline from which the breadth of the territorial sea is measured<sup>3</sup>. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own<sup>4</sup>. Baselines may not, however, be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them or unless such drawing has received general international recognition<sup>5</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 13 para 1. The definition in the Territorial Waters Order in Council, dated 25 September 1964, art 5(1) is slightly different, and defines a low-tide elevation as a naturally formed area of drying land surrounded by water which is below water at mean high water spring tides. Such low-tide elevations are to be treated as islands: art 2(2); and see *R v Kent Justices, ex p Lye* [1967] 2 QB 153, [1967] 1 All ER 560, 9 BILC 147, DC (structure erected on a sandbank).

2 As to the territorial sea see PARA 123 et seq.

3 United Nations Convention on the Law of the Sea art 13 para 1.

4 United Nations Convention on the Law of the Sea art 13 para 2. See also *Fisheries (United Kingdom v Norway)* ICJ Reports 1951, 116. As to the breadth of the territorial sea see PARA 124; and as to islands see PARA 127.

5 United Nations Convention on the Law of the Sea art 7 para 4.

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## 129. Bays.

A baseline may be drawn across a bay<sup>1</sup>, leaving the waters on the landward side of the line as internal waters<sup>2</sup> of the coastal state and providing the baseline for the delimitation of the territorial sea<sup>3</sup>. For this purpose, in respect of bays the coast of which belongs to a single state<sup>4</sup>, a bay is a well-marked indentation of the land whose penetration into the land is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a curvature of the coast<sup>5</sup>. An indentation is only to be regarded as a bay if its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation<sup>6</sup>. The area of an indentation is that which lies between the low-water mark around its shore and a line joining the low-water mark of its natural entrance points<sup>7</sup>. Where, because of the presence of islands<sup>8</sup>, an indentation has more than one mouth, the area of semi-circle may be calculated as if drawn on a line as long as the sum total of the lengths of the lines across the different mouths<sup>9</sup>. Islands within an indentation are included as if they formed part of its water area<sup>10</sup>.

These principles have been applied to the coastline of the United Kingdom<sup>11</sup>.

1 As to baselines see PARAS 125-126. The term 'bay' includes gulfs and estuaries: see *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, [1967] 3 All ER 663, 9 BILC 187, CA (Thames Estuary); and see the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 10. If a river flows directly into the sea, the baseline is a straight line across the mouth of the river between points on the low-water line of its banks: art 9.

2 As to internal waters see PARA 121.

3 As to the territorial sea see PARA 123 et seq.

4 United Nations Convention on the Law of the Sea art 10 para 1.

5 United Nations Convention on the Law of the Sea art 10 para 2; Territorial Waters Order in Council, dated 25 September 1964, art 5(1).

6 United Nations Convention on the Law of the Sea art 10 para 2; Territorial Waters Order in Council, dated 25 September 1964, art 5(1). See eg *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, [1967] 3 All ER 663, 9 BILC 187, CA.

7 United Nations Convention on the Law of the Sea art 10 para 3; Territorial Waters Order in Council, dated 25 September 1964, art 5(1). As to the natural entrance points in the Thames Estuary see *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, [1967] 3 All ER 663, 9 BILC 187, CA.

8 As to islands see PARA 127.

9 United Nations Convention on the Law of the Sea art 10 para 3; Territorial Waters Order in Council, dated 25 September 1964, art 5(1).

10 United Nations Convention on the Law of the Sea art 10 para 3.

11 The Orders in Council set out the principles but do not specify which indentations are to count as juridical bays. As to the baselines drawn around the United Kingdom coast see United Kingdom Hydrographic Office *The Territorial Sea Limits of the United Kingdom* (2006). See also the Explanatory Note to the Territorial Waters Order in Council, dated 25 September 1964.

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### 130. Closing limits of bays.

If the distance between the low-water marks at the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between those two low-water marks<sup>1</sup>. Where the distance between the low-water marks at the natural entrance exceeds 24 miles, a straight baseline may be drawn within the bay so as to enclose the maximum area of water that is possible with a line of that length<sup>2</sup>. In principle, where the boundary line between two or more countries reaches the coast at a point in an indentation that would, under this definition, be recognised as a bay, the waters are not internal waters: the baseline would be drawn along the low-water mark inside the bay and the territorial sea<sup>3</sup> drawn accordingly<sup>4</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 10 para 4; Territorial Waters Order in Council, dated 25 September 1964, art 4. Art 10 of the United Nations Convention on the Law of the Sea does not apply where the system of straight baselines (as to which see PARA 126) is applied, or in the case of 'historic bays' (ie bays claimed as internal waters on the basis of long usage establishing an historic title) art 10 para 6. As to historic title see PARA 118.

2 United Nations Convention on the Law of the Sea art 10 para 5; Territorial Waters Order in Council, dated 25 September 1964, art 4. In the United Kingdom, at common law the definition was given as whether a man could see from headland to headland (see *Fitzherbert's Coronae* 399, 8 Edw 2; Coke 4th Inst, c xxii, 140, as to the performance by a coroner of his office); or that arm or branch of the sea which lies within the fauces terrae where a man may reasonably discern between shore and shore, which is, or at least may be, within the body of a county (see Hale's de Jure Maris, c 4). See also *Direct United States Cable Co Ltd v Anglo-American Telegraph Co Ltd* (1877) 2 App Cas 394, 2 BILC 892, PC. In *R v Cunningham* (1859) Bell CC 72, 2 BILC 885, CCR, a point in the Bristol Channel, ten miles from the coast of Somerset, was held to be within the body of the county of Glamorgan; cf *The Fagernes* [1927] P 311, 2 BILC 914, CA, where the Crown disclaimed dominion over a place further down the Channel.

3 As to the territorial sea see PARA 123 et seq.

4 The point is, however, not free from doubt. The provisions of the United Nations Convention on the Law of the Sea are limited to bays whose coast is within one state: see art 10 para 1; and PARA 129. The bay may form the internal waters of the coastal states jointly as in the case of the Gulf of Fonseca, jointly claimed by Honduras, Nicaragua and El Salvador: see the decision of the Central American Court of Justice on 9 March 1917, 1 Hackworth's Digest 702-705; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua intervening)* ICJ Reports 1992, 351. Conversely, a 'border' bay may be claimed in its entirety by one of the bordering states. The United Kingdom claims that the waters of Lough Foyle, for example, fall within the United Kingdom: see 12 HC Official Reports (6th series), 11 November 1981, written answers col 82.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/131. Historic bays.

**131. Historic bays.**

A bay may become a part of internal waters by general acquiescence, even though the length of the closing line exceeds the limits permitted by the general law. Such bays are known as historic bays<sup>1</sup>. In the case of historic bays, the territorial waters are measured from a baseline passing across the bay at the place recognised as forming the limit of the national territory<sup>2</sup>.

1 United Kingdom reply to the Questionnaire of the League of Nations 1930, League of Nations Doc C74, M39, 1929 V, Question IV (b). The provisions of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) do not apply to such bays: art 10 para 6.

2 For a list of bays which have been claimed as historic bays see the United Nations *Historic Bays: Memorandum by the Secretariat of the United Nations* (UN Doc: A/CONF.13/1) 30 September 1957, which includes the Bristol Channel. See further the United Nations *Secretariat paper, Juridical Regime of Historic Waters, including Historic Bays*, (UN Doc: A/CN.4/143) 9 March 1962. The closing rule adopted in the United Nations Convention on the Law of the Sea art 10 reduces the importance of historic bays.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/132. Territorial sea boundary; opposite and adjacent states.

**132. Territorial sea boundary; opposite and adjacent states.**

Failing agreement to the contrary, where the coasts of two states are opposite or adjacent to each other, neither is entitled to extend its territorial sea<sup>1</sup> beyond the median line every point of which is equidistant from the nearest points on the baselines<sup>2</sup> from which the breadth of the territorial sea of each state is measured<sup>3</sup>.

1 As to the territorial sea see PARA 123 et seq.

2 As to baselines see PARAS 125-126.

3 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 15. This does not apply where for reasons of historic title or special circumstances a different line is justifiable: art 15. As to the marking of the line on large scale charts see art 15. As to the delimitation of their territorial seas in the Straits of Dover between the United Kingdom and France see the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic relating to the Delimitation of the Territorial Sea in the Straits of Dover (Paris, 2 November 1988; TS 26 (1989); Cm 733); and see PARA 141. There is no agreed boundary between the territorial seas of the United Kingdom and of Ireland.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/133. Innocent passage.

### **133. Innocent passage.**

Customary international law recognises a right of innocent passage through the territorial sea<sup>1</sup> for vessels of states other than the coastal state. This is a feature which distinguishes the territorial sea from internal or national waters<sup>2</sup>. The United Nations Convention on the Law of the Sea provides that ships of all states, whether coastal or not, enjoy the right of innocent passage through the territorial sea<sup>3</sup>.

'Passage' means navigation through the territorial sea for the purpose of traversing the territorial sea without entering internal waters, or of proceeding to internal waters from the high seas and of making for the high seas from internal waters<sup>4</sup>. It includes stopping and anchoring in so far as these are incidental to ordinary navigation or are rendered necessary by force majeure or distress or to render assistance to persons, ships or aircraft in danger or distress<sup>5</sup>.

Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state, and provided it takes place in accordance with international law<sup>6</sup>. Passage is prejudicial to those interests in this context if a foreign ship engages in the territorial sea in any of the following activities: (1) a threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state or in any other manner in violation of the principles of international law embodied in the United Nations Charter<sup>7</sup>; (2) any exercise or practice with weapons<sup>8</sup>; (3) any act aimed at collecting information to the prejudice of the defence or security of the coastal state<sup>9</sup>; (4) any act of propaganda aimed at affecting the defence or security of the coastal state<sup>10</sup>; (5) launching, landing or taking on board of an aircraft<sup>11</sup>; (6) launching, landing or taking on board of any military device<sup>12</sup>; (7) loading or unloading a commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws of the coastal state<sup>13</sup>; (8) an act of wilful and serious pollution<sup>14</sup>; (9) fishing<sup>15</sup>; (10) carrying out research or survey activities<sup>16</sup>; (11) an act aimed at interfering with any systems of communication or any other facilities or installations of the coastal state<sup>17</sup>; and (12) any other activity which does not have a direct bearing on passage<sup>18</sup>. There are indications that this list of activities provides an exhaustive set of criteria for determining the innocence of passage<sup>19</sup>.

Submarines must navigate on the surface and show their flags<sup>20</sup>. There is no right of innocent passage for aircraft.

1 As to the territorial sea see PARA 123 et seq.

2 See, however, the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 8 para 2, which provides that where, by reason of the coastal state's adoption of the straight baseline method for the delimitation of its waters, areas of the sea which were previously territorial waters or high seas have now become part of its internal waters, the right of innocent passage continues to exist in that area of the internal waters.

3 United Nations Convention on the Law of the Sea art 17 para 1. The Convention contains articles dealing with innocent passage generally: see Pt II Section 3 (arts 17-31). Part II Section 3(A) (arts 17-26) applies to all ships including government ships whether operated commercially or not (arts 21, 22 para 1). Part II Section 3(B) (arts 27-28) applies to merchant ships and to government ships operated commercially (art 27). Part II Section 3(C) (arts 29-32) applies to warships and other government ships operated for non-commercial purposes.

4 United Nations Convention on the Law of the Sea art 18 para 1. Voyages of vessels engaged in the coasting trade or cabotage are not included in this definition. Passage for other purposes is not innocent passage, and the ship is completely subject to the authority of the coastal state.



5 United Nations Convention on the Law of the Sea art 18 para 2. Stopping for other reasons may, however, not be illegal.

6 United Nations Convention on the Law of the Sea art 19 para 1. The intention appears to be that the innocence or otherwise of the passage is to be tested by the manner in which it is carried out. It may also be tested by the object of the passage: see *Corfu Channel (United Kingdom v Albania)* ICJ Reports 1949, 4.

7 United Nations Convention on the Law of the Sea art 19 para 2(a). For the Charter of the United Nations (San Francisco, 26 June 1945, see TS 67 (1946); Cmd 7015).

8 United Nations Convention on the Law of the Sea art 19 para 2(b).

9 United Nations Convention on the Law of the Sea art 19 para 2(c).

10 United Nations Convention on the Law of the Sea art 19 para 2(d).

11 United Nations Convention on the Law of the Sea art 19 para 2(e).

12 United Nations Convention on the Law of the Sea art 19 para 2(f).

13 United Nations Convention on the Law of the Sea art 19 para 2(g).

14 United Nations Convention on the Law of the Sea art 19 para 2(h).

15 United Nations Convention on the Law of the Sea art 19 para 2(i).

16 United Nations Convention on the Law of the Sea art 19 para 2(j).

17 United Nations Convention on the Law of the Sea art 19 para 2(k).

18 United Nations Convention on the Law of the Sea art 19 para 2(l).

19 See the USA-USSR Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage (Jackson Hole, Wyoming, 23 September 1989) 14 (UN) Law of the Sea Bulletin 13.

20 United Nations Convention on the Law of the Sea art 20.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/134. Laws and regulations of coastal states in relation to innocent passage.

#### **134. Laws and regulations of coastal states in relation to innocent passage.**

The United Nations Convention on the Law of the Sea specifically provides that the coastal state may adopt laws and regulations<sup>1</sup> relating to innocent passage<sup>2</sup> in respect of all or any of the following: (1) safety of navigation and the regulation of maritime traffic<sup>3</sup>; (2) protection of navigational and other aids and facilities<sup>4</sup>; (3) protection of cables and pipelines<sup>5</sup>; (4) conservation of the living resources of the sea<sup>6</sup>; (5) prevention of infringement of its fisheries laws and regulations<sup>7</sup>; (6) preservation of its environment and prevention, reduction and control of pollution thereof<sup>8</sup>; (7) marine scientific research and hydrographic surveys<sup>9</sup>; and (8) prevention of infringement of its customs, fiscal, immigration or sanitary laws and regulations<sup>10</sup>. The laws and regulations must not apply to the design, construction, manning or equipment of foreign ships unless they give effect to generally accepted international rules or standards<sup>11</sup>. The sovereignty of a coastal state over its territorial sea<sup>12</sup> would, in any event, entitle the coastal state to adopt any laws and regulations that are consistent with the right of innocent passage and with the provisions of the Convention.

1 Due publicity must be given to any laws and regulations: United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 21 para 3.

2 As to the meaning of 'innocent passage' see PARA 133. As to the laws and regulations on the coastal state in relation to transit passage see PARA 144.

3 United Nations Convention on the Law of the Sea art 21 para 1(a). Article 22 enables the coastal state to require foreign ships to use such sea lanes and traffic separation schemes as it may designate or prescribe. Foreign ships must comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea: art 21 para 4.

4 United Nations Convention on the Law of the Sea art 21 para 1(b).

5 United Nations Convention on the Law of the Sea art 21 para 1(c).

6 United Nations Convention on the Law of the Sea art 21 para 1(d).

7 United Nations Convention on the Law of the Sea art 21 para 1(e).

8 United Nations Convention on the Law of the Sea art 21 para 1(f). Nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances must carry documents and observe special precautionary measures established for them by international agreements: art 23.

9 United Nations Convention on the Law of the Sea art 21 para 1(g).

10 United Nations Convention on the Law of the Sea art 21 para 1(h).

11 United Nations Convention on the Law of the Sea art 21 para 2. Measures adopted by the International Maritime Organization are the main source of such rules and standards.

12 As to the sovereignty of a coastal state over its territorial sea see PARA 136 et seq.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/135. Duties of the coastal states in relation to innocent passage.

**135. Duties of the coastal states in relation to innocent passage.**

The coastal state must not hamper innocent passage<sup>1</sup> through its territorial sea. In applying the United Nations Convention on the Law of the Sea<sup>2</sup> or any laws or regulations it has adopted in conformity with it, the coastal state must not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage or which discriminate in form or in fact against the ships of any state or ships carrying cargoes to, from or on behalf of any state<sup>3</sup>. It must give appropriate publicity to any danger to navigation of which it has knowledge within its territorial sea<sup>4</sup>.

1 As to the meaning of 'innocent passage' see PARA 133.

2 I.e. the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524).

3 United Nations Convention on the Law of the Sea art 24 para 1. In this, as in all other matters, the UN Security Council may order states to act contrary to the Convention and to prevent the passage of certain ships, eg in order to implement UN sanctions: as to the powers and functions of the Security Council see PARA 523.

4 United Nations Convention on the Law of the Sea art 24 para 2. As to the territorial sea see PARA 123 et seq.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/136. Rights of protection of the coastal state.

**136. Rights of protection of the coastal state.**

The coastal state may take the necessary steps in its territorial sea<sup>1</sup> to prevent passage which is not innocent<sup>2</sup>; and with respect to ships proceeding to its internal waters it may take any steps to prevent a breach of the conditions to which admission to those waters is subject<sup>3</sup>. The coastal state, without discrimination among foreign ships, may temporarily suspend the right of innocent passage in specified areas of its territorial sea if that is essential for the protection of its security, including the conduct of weapons exercises<sup>4</sup>.

1 As to the territorial sea see PARA 123 et seq.

2 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 25 para 1. As to innocent passage see PARA 133.

3 United Nations Convention on the Law of the Sea art 25 para 2.

4 United Nations Convention on the Law of the Sea art 25 para 3. Thus a permanent prohibition over part of or all, or a temporary prohibition over all, the territorial sea would not be warranted by this provision. Nonetheless, some states have permanently closed areas in front of military ports. Such suspension as is permitted only takes effect after being duly published: art 25 para 3. There being no provision for independent assessment, it may be presumed that the coastal state is in fact the sole judge of its security requirements.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/137. Charges on foreign ships.

**137. Charges on foreign ships.**

No charge may be levied upon foreign ships by reason only of their passage through the territorial sea<sup>1</sup>. Charges may only be levied for services rendered to ships passing through the territorial sea, and on a non-discriminatory basis<sup>2</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 26 para 1.

2 See the United Nations Convention on the Law of the Sea art 26 para 2. As to the territorial sea see PARA 123 et seq.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/138. Criminal jurisdiction over foreign ships.

### **138. Criminal jurisdiction over foreign ships.**

The criminal jurisdiction of the coastal state should not be exercised on board a foreign ship passing through the territorial<sup>1</sup> sea to arrest any person or conduct any investigation in connection with a crime committed on board a ship during its passage through the territorial sea unless: (1) the consequences of the crime extend to the coastal state; (2) the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (3) the captain or the consul of the country whose flag the ship flies has requested the assistance of the local authorities; or (4) it is necessary for the suppression of the illicit traffic in narcotic drugs or psychotropic substances<sup>2</sup>. This does not affect the right of the coastal state to arrest or carry out an investigation on board a foreign ship passing through the territorial sea after leaving internal waters<sup>3</sup>. On the other hand, as a general rule the coastal state may not take any steps on board a foreign ship passing through the territorial waters to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial waters if the ship is only passing through the territorial waters without entering internal waters<sup>4</sup>.

1 As to the territorial sea see PARA 123 et seq.

2 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982: TS 81 (1999); Cmnd 4524) art 27 para 1. The use of the word 'should' in this article is deliberate; it thus appears that the formulation is not of a rule of law but of comity: cf art 27 para 5 (see the text and note 4). A foreign ship is a merchant ship or a government ship operated for commercial purposes. Warships and persons on them enjoy immunity from the jurisdiction of the coastal state: see art 32; and *Chung Chi Cheung v R* [1939] AC 160, [1938] 4 All ER 786, 3 BILC 96, PC, where, however, the immunity was waived. See also *Pianka v R* [1979] AC 107, [1977] 3 WLR 859, PC. The rules stated in the text are only concerned with the exercise of jurisdiction over or on board the ship itself, and do not affect the right of the coastal state to exercise its criminal jurisdiction over persons who were on board the ship at the time of the offence but who later come into the custody of the coastal state by means other than the stopping of the ship: see the Territorial Waters Jurisdiction Act 1878; but see also the Consular Relations Act 1968 ss 1(2), 5; PARA 303.

3 United Nations Convention on the Law of the Sea art 27 para 2. Whenever the coastal state does exercise its jurisdiction over or on board a ship under this provision or art 27 para 1 (see the text and note 2), it must, if the captain requests, notify a diplomatic agent or consular officer of the flag state and facilitate contact between them before taking any steps, although, in case of emergency, this may be done while the steps are being taken: art 27 para 3. In making an arrest, the authorities must pay due regard to the interests of navigation: art 27 para 4.

4 United Nations Convention on the Law of the Sea art 27 para 5. The crime would not be one which falls within heads (1)-(4) in the text. However, art 27 para 5 provides that the coastal state 'may not' take any steps, whereas art 27 para 1 provides that it 'should not': see the text and note 2. The rule here stated does not affect the situation where, while in territorial waters, the ship is at anchor not incidentally to navigation and therefore outside the right of innocent passage. Such ships are fully subject to the jurisdiction of the coastal state.

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### **139. Civil jurisdiction over merchant ships.**

The coastal state should<sup>1</sup> not stop or divert a foreign ship passing through the territorial sea<sup>2</sup> for the purpose of exercising civil jurisdiction in relation to persons on board the ship<sup>3</sup>. It may not<sup>4</sup> levy execution nor arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities of the ship itself assumed or incurred in the course of, or for the purpose of, its voyage through the waters of the coastal state<sup>5</sup>, unless the vessel is either lying in the territorial sea or passing through it after leaving internal waters<sup>6</sup>.

1 As to the significance of the word 'should' see PARA 138 note 2.

2 As to the territorial sea see PARA 123 et seq.

3 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 28 para 1. As to torts committed on board ships in territorial waters see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 372.

4 See PARA 138 note 4.

5 United Nations Convention on the Law of the Sea art 28 para 2.

6 United Nations Convention on the Law of the Sea art 28 para 3.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/140. Passage of warships.

#### **140. Passage of warships.**

If any warship<sup>1</sup> does not comply with the regulations of the coastal state concerning passage through the territorial sea<sup>2</sup> and disregards any request for compliance made to it, the coastal state may require the warship to leave its territorial sea<sup>3</sup>. The United Kingdom considers that the right of innocent passage extends to warships, and that their entry into the territorial sea cannot be made subject to the prior notification or the authorisation of the coastal state<sup>4</sup>.

1 For the purposes of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) 'warship' means a ship belonging to the armed forces of a state bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the state and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline: art 29. See also UK Ministry of Defence *The Manual of the Law of Armed Conflict* (2004) para 13.5.

2 As to the territorial sea see PARA 123 et seq.

3 United Nations Convention on the Law of the Sea art 30. This provision is needed because warships and other government ships operated non-commercially are generally immune from the jurisdiction of the coastal state: see art 32; and PARA 138 note 2. The flag state bears international responsibility for damage to the coastal state resulting from non-compliance by such ships with laws and regulations of the coastal state concerning passage (see PARA 134) or the provisions of the Convention or other rules of international law: art 31.

4 See 388 HL Official Report (6th series), 1 February 1978, written answers cols 846-847; and the Notice issued by the UK Hydrographic Office on 1 January 2002, (2001) 72 BYIL 634, at 639. The articles of the United Nations Convention on the Law of the Sea concerning the right of innocent passage are stated therein to be applicable to 'all ships': United Nations Convention on the Law of the Sea Pt II Section 3(A) (arts 17-26). Submarines and other underwater vehicles are required to navigate on the surface in the territorial sea and to show their flags: art 20.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/141. Passage through straits used for international navigation.

#### **141. Passage through straits used for international navigation.**

Under the United Nations Convention on the Law of the Sea<sup>1</sup> there exists, in straits which are used for international navigation<sup>2</sup> between one part of the high seas<sup>3</sup> or an exclusive economic zone<sup>4</sup> and another part of the high seas or an exclusive economic zone, a right of transit passage<sup>5</sup> for all ships and aircraft both military and commercial, which must not be impeded<sup>6</sup>.

However, where the strait is formed by an island of a state bordering the state and the mainland, transit passage does not apply therein if there exists seaward of the island a route through the high seas<sup>7</sup> or through an exclusive economic zone<sup>8</sup> of similar convenience with respect to navigational and hydrographical characteristics<sup>9</sup>. The right of innocent passage<sup>10</sup> applies to such straits excluded from the regime of transit passage<sup>11</sup>. Innocent passage also applies in straits used for international navigation between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state<sup>12</sup>. The coastal state may not suspend innocent passage through such straits<sup>13</sup>.

Although high seas routes or routes through exclusive economic zones in straits wider than 24 nautical miles are excluded from the regime of transit passage, the freedoms of navigation and of overflight exist in such routes<sup>14</sup>.

The extent to which the Convention's provisions extend beyond customary international law rights of passage through straits is controversial<sup>15</sup>.

1 See the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) Pt III (arts 34-45).

2 The term 'international navigation' is taken from the judgment of the International Court of Justice in *Corfu Channel (United Kingdom v Albania)* ICJ Reports 1949, 4.

3 As to the high seas see the United Nations Convention on the Law of the Sea Pt VII; and PARA 147 et seq.

4 As to the exclusive economic zone see the United Nations Convention on the Law of the Sea Pt V (arts 55-75); and PARA 154.

5 As to the meaning of 'transit passage' see PARA 143. The provisions on transit passage are more favourable to ships of non-coastal states than is the right of innocent passage: see PARAS 133-140. They were a concession to the major shipping states in return for their acceptance of a 12-mile limit for the territorial sea, which resulted in some straits, part of which had previously been high seas (see Pt VII (arts 86-120, especially arts 87, 90), falling within the territorial sea of one or more coastal states. As to the territorial sea see Pt II (arts 2-33) of the Convention, and PARA 123 et seq. As to the breadth of the territorial sea see art 3; and PARA 124.

6 United Nations Convention on the Law of the Sea art 38 para 1.

7 United Nations Convention on the Law of the Sea art 38 para 1. As to the high seas see PARA 147 et seq.

8 As to the exclusive economic zone see PARA 154.

9 United Nations Convention on the Law of the Sea art 38 para 1.

10 As to innocent passage see PARAS 133-140.

11 United Nations Convention on the Law of the Sea art 45 para 1(a). The Pentland Firth south of Orkney, and the passage between the Scilly Isles and Cornwall, for example, fall into this category.

12 United Nations Convention on the Law of the Sea art 45 para 1(b).

13 United Nations Convention on the Law of the Sea art 45 para 2.

14 United Nations Convention on the Law of the Sea art 36. As to the freedom of the high seas see PARA 147 et seq.

15 Before it became a party to the United Nations Convention on the Law of the Sea, the United Kingdom already regarded the right of transit passage as part of customary international law. Straits in which it accords transit passage are the Straits of Dover (which since 1987 fall within the territorial seas of the United Kingdom and France), the North Channel, and the passage between Shetland and Orkney: 804 HL Official Report (5th series), 5 February 1987, col 382. The 'right of unimpeded transit passage' through the Straits of Dover was confirmed by the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic relating to the Delimitation of the Territorial Sea in the Straits of Dover (Paris, 2 November 1988; TS 26 (1989); Cm 733).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/142. Legal status of waters.

**142. Legal status of waters.**

A right of transit passage<sup>1</sup> does not otherwise affect the legal status of the waters of the straits through which it exists, or the exercise by the coastal states of their sovereignty or jurisdiction over the waters of such straits and the corresponding air space, seabed and subsoil<sup>2</sup>. Nor does it affect the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to them<sup>3</sup>.

1 As to the meaning of 'transit passage' see PARA 143.

2 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; Misc 11 (1983); Cmd 8491) art 34 para 1. The sovereignty or jurisdiction of the coastal state is exercised subject to Pt II (arts 2-33) and to other rules of international law: art 34 para 2.

3 United Nations Convention on the Law of the Sea art 35(c). The Turkish straits, governed by the Convention regarding the Regime of the Straits (of the Dardanelles) (Montreux, 20 July 1936; TS 30 (1937); Cmd 5551) (the 'Montreux Convention') to which the United Kingdom is a party, is an example.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/143. Meaning of 'transit passage'.

**143. Meaning of 'transit passage'.**

'Transit passage' means the exercise in accordance with Part III of the United Nations Convention on the Law of the Sea of freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait, refraining from the threat or use of force in violation of international law, and refraining from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or distress<sup>1</sup>. The requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a coastal state subject to the conditions of entry to that state<sup>2</sup>. Transit passage differs from innocent passage *inter alia* in having no criterion of innocence and in including a right of overflight<sup>3</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 38 para 2.

2 See the United Nations Convention on the Law of the Sea art 38 para 2.

3 The right of coastal states to make laws and regulations for ships in transit passage is also restricted, as to which see the United Nations Convention on the Law of the Sea arts 41 and 42; and PARA 144. Some states consider that the reference to 'normal modes of continuous and expeditious transit' indicates that submarines may exercise the right while submerged.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/144. Laws and regulations of coastal states in relation to transit passage.

#### **144. Laws and regulations of coastal states in relation to transit passage.**

The right of states to legislate for ships in transit passage<sup>1</sup> is constrained by the duty not to deny, hamper or impair the right of transit passage<sup>2</sup>. Coastal states may adopt non-discriminatory<sup>3</sup> laws and regulations relating to transit passage in respect of all or any of the following: (1) the safety of navigation and the regulation of maritime traffic, as provided<sup>4</sup> in the United Nations Convention on the Law of the Sea<sup>5</sup>; (2) the prevention, reduction and control of pollution by giving effect to applicable international regulations regarding the discharge of oil, oily waters and other noxious substances in the strait<sup>6</sup>; (3) the prevention of fishing by fishing vessels, including the stowing of fishing gear<sup>7</sup>; and (4) the loading of any commodity, currency or person in contravention of their customs, fiscal, immigration laws and regulations<sup>8</sup>.

The laws and regulations referred to must not be discriminatory<sup>9</sup>, and must be given due publicity<sup>10</sup>. Foreign ships must comply with them<sup>11</sup>. The flag state of a ship or the state of registry of an aircraft which is entitled to sovereign immunity bears international responsibility for any loss or damage to the coastal state resulting from non-compliance with such laws and regulations by that ship or aircraft<sup>12</sup>.

1 As to the meaning of 'transit passage' see PARA 143. As to the laws and regulations of the coastal state in relation to innocent passage see PARA 134.

2 See the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 42 para 2.

3 See the United Nations Convention on the Law of the Sea art 42 para 2. Coastal states may establish sea lanes and traffic separation schemes in straits where necessary to promote the safe passage of ships, after referring them to the competent international organisation (which is the International Maritime Organization): see art 41.

4 See as provided by the United Nations Convention on the Law of the Sea art 41.

5 United Nations Convention on the Law of the Sea art 42 para 1(a).

6 United Nations Convention on the Law of the Sea art 42 para 1(b). The reference to 'international regulations' precludes the adoption of regulations at variance with applicable regulations framed by bodies such as the International Maritime Organization.

7 United Nations Convention on the Law of the Sea art 42 para 1(c).

8 United Nations Convention on the Law of the Sea art 42 para 1(d).

9 United Nations Convention on the Law of the Sea art 42 para 2.

10 United Nations Convention on the Law of the Sea art 42 para 3.

11 United Nations Convention on the Law of the Sea art 42 para 4.

12 United Nations Convention on the Law of the Sea art 42 para 5.

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**145. Duties of states bordering straits in relation to transit passage.**

States bordering straits must not hamper transit passage<sup>1</sup>. They must give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge<sup>2</sup>. They may not suspend transit passage<sup>3</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) article 44. As to the meaning of 'transit passage' see PARA 143.

2 United Nations Convention on the Law of the Sea art 44. The duty arises because the waters of the strait are by definition a part of the territorial sea of the coastal state, in respect of which the responsibility to notify known dangers subsists: see PARA 135.

3 United Nations Convention on the Law of the Sea art 44. Contrast the right temporarily to suspend innocent passage through parts of the territorial sea that do not constitute straits: art 25 para 2; and PARA 136.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(1) INTERNAL WATERS AND THE TERRITORIAL SEA/146. Duties of ships and aircraft.

#### **146. Duties of ships and aircraft.**

Ships and aircraft exercising the right of transit passage must: (1) proceed without delay through or over the strait<sup>1</sup>; (2) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of the states bordering the strait or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations<sup>2</sup>; (3) refrain from activities other than those incident to their normal modes of continuous and expeditious transit<sup>3</sup> unless rendered necessary by force majeure or distress<sup>4</sup>; and (4) comply with relevant provisions of Part II of the United Nations Convention on the Law of the Sea<sup>5</sup>. Ships must comply with generally accepted international regulations<sup>6</sup>, procedures and practices for safety at sea including the International Regulations for Preventing Collisions at Sea<sup>7</sup> and with international regulations, procedures and practices for the prevention, reduction and control of pollution from ships<sup>8</sup>. Civil aircraft must observe the Rules of the Air established by the International Civil Aviation Organisation<sup>9</sup> and monitor radio frequencies, including the appropriate international distress frequency<sup>10</sup>. Ships may not carry out research or survey activities without prior authorisation of the coastal states<sup>11</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 39 para 1(a).

2 United Nations Convention on the Law of the Sea art 39 para 1(b). The Charter referred to is the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015). The Charter obligations include a duty to refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of any state, whether or not bordering the strait.

3 The reference to 'normal modes of continuous and expeditious transit' is widely understood to acknowledge the right of submarines to exercise the right of transit passage while submerged, in contrast to the right of innocent passage which must be exercised on the surface: see PARA 133.

4 United Nations Convention on the Law of the Sea art 39 para 1(c).

5 United Nations Convention on the Law of the Sea art 39 para 1(d). The provisions referred to in the text are Pt II (arts 2-33) concerning the territorial sea, as to which see PARA 123 et seq above.

6 The reference to 'generally accepted international regulations' is understood to refer to measures adopted by the competent international agencies, notably the International Maritime Organization.

7 I.e the Convention on the International Regulations for Preventing Collisions at Sea (London, 20 October 1972; TS 77 (1977); Cmnd 6962): see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 715 et seq.

8 United Nations Convention on the Law of the Sea art 39 para 2. For the relevant measures regarding pollution from ships see Pt XII (arts 192-237); and PARA 193.

9 As to the International Civil Aviation Organisation see **AIR LAW** vol 2 (2008) PARA 20 et seq. As to the domestic Rules of the Air see **AIR LAW** vol 2 (2008) PARA 357.

10 United Nations Convention on the Law of the Sea art 39 para 3.

11 See the United Nations Convention on the Law of the Sea art 40.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(i) In general/147. Freedom of the high seas.

## **(2) THE HIGH SEAS**

### **(i) In general**

#### **147. Freedom of the high seas.**

In the United Nations Convention on the Law of the Sea<sup>1</sup>, the term 'high seas' denotes all parts of the sea not included in the exclusive economic zone, the territorial sea or internal waters of a state or in the archipelagic waters of an archipelagic state<sup>2</sup>. The high seas are *res communis* and open to all states, whether coastal or land-locked<sup>3</sup>, so that no state may validly purport to subject any part of the high seas to its sovereignty<sup>4</sup>. They are reserved for peaceful purposes<sup>5</sup>. Freedom of the high seas comprises, *inter alia*, both for coastal and land-locked states: (1) freedom of navigation<sup>6</sup>; (2) freedom of overflight<sup>7</sup>; (3) freedom to lay submarine cables and pipelines<sup>8</sup>; (4) freedom to construct artificial islands and other permitted installations<sup>9</sup>; (5) freedom of fishing<sup>10</sup>; and (6) freedom of scientific research<sup>11</sup>. These freedoms must be exercised subject to the conditions laid down in the Convention and by other rules of international law<sup>12</sup> and with due regard to the interests of other states in their exercise of the freedom of the high seas<sup>13</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524). Pt VII (arts 86-115) contains provisions relating to the high seas. The United Kingdom became a party to the Convention on 24 August 1997: see the London Gazette, 29 August 1997. The Convention supersedes the Convention on the High Contiguous Zone (Geneva, 29 April 1958; TS 5 (1963); Cmnd 1929). The latter remains in force between the United Kingdom and other states which are parties to it but not to the United Nations Convention on the Law of the Sea.

2 United Nations Convention on the Law of the Sea art 86. As to the exclusive economic zone see Pt V (arts 55-75); and PARA 154. As to the territorial sea and contiguous zone see Pt II (arts 2-33); and PARAS 123 et seq, 153. As to archipelagic states see Pt IV (arts 46-54) of the Convention.

3 United Nations Convention on the Law of the Sea art 87.

4 United Nations Convention on the Law of the Sea art 89.

5 United Nations Convention on the Law of the Sea art 88.

6 United Nations Convention on the Law of the Sea art 87 para 1(a).

7 United Nations Convention on the Law of the Sea art 87 para 1(b).

8 United Nations Convention on the Law of the Sea art 87 para 1(c). This is subject to the provisions in Pt VI (arts 56-85) concerning the continental shelf (see PARA 163 et seq).

9 United Nations Convention on the Law of the Sea art 87 para 1(d). This is also subject to the provisions in Pt VI concerning the continental shelf (see PARA 163 et seq).

10 United Nations Convention on the Law of the Sea art 87 para 1(e). This is subject to the provisions of Pt VII Section 2 (arts 116-120) concerning the conservation and management of the living resources of the high seas (PARA 190 et seq).

11 United Nations Convention on the Law of the Sea art 87 para 1(f). This is subject to the provisions of Pt VI concerning the continental shelf (see PARA 163 et seq) and Pt XIII (arts 238-269) concerning marine scientific research: see PARA 194.



- 12 United Nations Convention on the Law of the Sea art 87 para 1.
- 13 United Nations Convention on the Law of the Sea art 87 para 2.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(i) In general/148. Freedom of navigation and jurisdiction over foreign ships on the high seas.

#### **148. Freedom of navigation and jurisdiction over foreign ships on the high seas.**

The high seas are open to navigation by ships of all states whether coastal or land-locked<sup>1</sup>. No state may interfere with the ships of other states or exercise jurisdiction over them<sup>2</sup> in time of peace<sup>3</sup> except within the contiguous zone<sup>4</sup>, under the doctrine of hot pursuit<sup>5</sup>, and in the exercise of self-defence<sup>6</sup>. A warship which encounters a foreign merchant ship on the high seas is not justified in boarding it without the consent of the state whose flag the ship is flying<sup>7</sup>, except where the act of interference derives from powers conferred by treaty<sup>8</sup>, unless there is reasonable ground for suspecting that the ship is engaged in piracy<sup>9</sup>, the slave trade<sup>10</sup>, or unauthorised broadcasting<sup>11</sup>, or that, despite the appearance of the flag that it is flying or its refusal to fly any flag<sup>12</sup>, the ship is without nationality<sup>13</sup> or is, in reality, of the same nationality as the warship<sup>14</sup>. In such cases the warship has the right to verify the ship's right to fly its flag<sup>15</sup>.

1 See the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 90.

2 *Lotus Case* PCIJ Ser A No 10 (1927). See also *Le Louis* (1817) 2 Dods 210 at 243, 3 BILC 691 per Lord Stowell; *The Costa Rica Packet Case* (1897) 5 Moore Int Arb 4948; *The Jessie, The Thomas F Bayard and The Pescawha* 6 RIAA 57 (1921).

3 As to the exercise of jurisdiction or control over foreign ships in time of armed conflict, see UK Ministry of Defence *Manual on the Law of Armed Conflict* (2005) Ch 13; and **WAR AND ARMED CONFLICT**.

4 As to the contiguous zone see the United Nations Convention on the Law of the Sea art 133; and PARA 153.

5 As to hot pursuit see the United Nations Convention on the Law of the Sea art 111; and PARA 161.

6 See eg *The Virginius Case* (1874) 76 Parliamentary Papers 299, 391, where Great Britain recognised a capture on the high seas as an exercise of self-defence. The UK adopted a similar position with respect to visit and search on the high seas during the 1980-1988 Iran-Iraq war: see 127 HC official Reports (6th series), 15 February 1988, cols 424-425. As to self-defence generally see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 403 et seq.

7 It is not clear whether such consent may be given by the master of the ship or must be given by the governmental authorities of the flag state.

8 Including a treaty other than the United Nations Convention on the Law of the Sea itself: United Nations Convention on the Law of the Sea art 110 para 1.

9 United Nations Convention on the Law of the Sea art 110 para 1(a). As to piracy see arts 101-107; and PARA 155 et seq.

10 United Nations Convention on the Law of the Sea art 110 para 1(b). As to the slave trade see art 99; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 125.

11 United Nations Convention on the Law of the Sea art 110 para 1(c). As to unauthorised broadcasting see art 109; PARA 196; and **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 582 et seq.

12 A warship may interfere with a merchant vessel which is flying a flag of no state: *Naim Molvan (Owners of Motor Vessel Asya) v A-G for Palestine* [1948] AC 351, 1 BILC 674, PC.

13 United Nations Convention on the Law of the Sea art 110 para 1(d).

14 United Nations Convention on the Law of the Sea art 110 para 1(e).

15 United Nations Convention on the Law of the Sea art 110 para 2. It may send a boat under the command of an officer to the suspected ship, and if suspicion remains after the ship's documents have been checked, it may proceed to a further examination on board ship, which must be carried out with all possible consideration: art 110 para 2. If the suspicions prove to be unfounded and the ship boarded has not committed any act justifying them, it must be compensated for any loss or damage that may have been sustained: art 110 para 3. These provisions (ie art 110 paras 1-3) apply *mutatis mutandis* to military aircraft (art 110 para 4) and to any other duly authorised ships or aircraft clearly marked and identifiable as being on government service (art 110 para 5).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(i) In general/149. Status of ships.

**149. Status of ships.**

A ship may sail under the flag of one state only and may not change its flag during a voyage or while in a port of call, unless there is a real transfer of ownership or change of registry<sup>1</sup>. A ship which sails under the flags of two or more states, using them as flags of convenience, may not claim the nationality of any of those flag states against another state and may be treated as a ship with no nationality<sup>2</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 92 para 1.

2 United Nations Convention on the Law of the Sea art 92 para 2. This provision and that referred to in note 1 do not prejudice the question of ships employed on the official service of the United Nations, its specialised agencies or the International Atomic Energy Agency (as to which see PARA 533) flying the flag of the organisation. As to the nationality of ships see PARA 395. See also PARA 396. As to the exercise of jurisdiction over ships with no nationality see PARA 148 note 12.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(i) In general/150. Penal jurisdiction over ships on the high seas in matters of collision etc.

**150. Penal jurisdiction over ships on the high seas in matters of collision etc.**

Save in exceptional cases expressly provided for in international treaties or in the United Nations Convention on the Law of the Sea<sup>1</sup>, a ship on the high seas is subject to the exclusive jurisdiction of its flag state<sup>2</sup>. In the event of a collision or other incident of navigation<sup>3</sup> concerning a ship on the high seas which involves the responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag state or the state of which that person is a national<sup>4</sup>. Only the authorities of the flag state may order the arrest or detention of the ship, even for purposes of investigation<sup>5</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524).

2 United Nations Convention on the Law of the Sea art 97 para 1. See also art 110, and PARA 148. As to jurisdiction over offences committed on board British ships on the high seas see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 625. See also PARA 144.

3 Eg damage to a pipeline or submarine telegraph cable: see the United Nations Convention on the Law of the Sea art 113; and PARA 169.

4 United Nations Convention on the Law of the Sea art 97 para 1. This effectively negates the decision of the Permanent Court of International Justice in *Lotus Case* PCIJ Ser A No 10 (1927). See, to the same effect, the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collisions or other Incidents of Navigation (Brussels, 10 May 1952; TS 47 (1960); Cmnd 1128). In disciplinary matters only the state which has issued a master's certificate of competence or licence is competent to withdraw the certificate even if the holder is the national of another state: United Nations Convention on the Law of the Sea art 97 para 2. For the duties in respect of dangers to life at sea see art 98.

5 United Nations Convention on the Law of the Sea art 97 para 3.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(i) In general/151. Jurisdiction over warships.

**151. Jurisdiction over warships.**

Warships on the high seas have complete immunity from the jurisdiction of any state other than the flag state<sup>1</sup>, as do ships owned or operated by a state and used only on government non-commercial service<sup>2</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 95.

2 United Nations Convention on the Law of the Sea art 96.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(i) In general/152. Obligations of states in respect of the high seas.

### **152. Obligations of states in respect of the high seas.**

The freedom of the high seas must be exercised by all states with due regard for the interests of other states in their exercise of the freedom of the high seas<sup>1</sup>.

Every state must adopt effective measures to prevent and punish the transport of slaves in vessels flying its flag and the unlawful use of its flag for that purpose<sup>2</sup>. It must co-operate to the fullest possible extent in the repression of piracy<sup>3</sup>. Every state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships under its flag<sup>4</sup>, and must maintain a register of ships and assume jurisdiction under its internal law over such ships, and their masters, officers and crew in such matters<sup>5</sup>.

Every state must take such measures as are necessary to ensure safety at sea with regard, inter alia, to: (1) the construction, equipment and seaworthiness of ships; (2) the manning of ships, labour conditions and the training of crews; and (3) the use of signals, the maintenance of communications and the prevention of collisions<sup>6</sup>. These measures must be taken in the light of generally accepted international regulations, procedures and practices and a state must take necessary steps to secure their observance<sup>7</sup>.

A state which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag state which must investigate the matter and, if appropriate, take any action necessary remedy the situation<sup>8</sup>. A flag state must cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas causing loss of life or serious injury to nationals of another state or serious damage to ships or installations of another state or to the marine environment<sup>9</sup>. The flag state and the other state must co-operate in the conduct of such inquiry<sup>10</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 87 para 2.

2 United Nations Convention on the Law of the Sea art 99. See also art 110 para 1(b). As to slavery and the slave trade see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 125.

3 United Nations Convention on the Law of the Sea art 100. See also art 110 para 1(a). As to piracy see PARA 155 et seq.

4 United Nations Convention on the Law of the Sea art 94 para 1.

5 United Nations Convention on the Law of the Sea art 94 para 2.

6 United Nations Convention on the Law of the Sea art 94 para 3. See also art 94 para 4.

7 United Nations Convention on the Law of the Sea art 94 para 5.

8 United Nations Convention on the Law of the Sea art 94 para 6.

9 United Nations Convention on the Law of the Sea art 94 para 7. As to shipping inquiries see **SHIPPING AND MARITIME LAW**.

10 United Nations Convention on the Law of the Sea art 94 para 7.

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### **153. Contiguous zone.**

In a zone contiguous to its territorial sea a coastal state may exercise the control necessary (1) to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; and (2) to punish infringement of those laws and regulations committed within its territory or territorial sea<sup>1</sup>. A coastal state may also presume that the removal from the seabed of the contiguous zone of objects of an archaeological or historical nature would result in an infringement of those laws and regulations<sup>2</sup>. A contiguous zone may not extend beyond 24 nautical miles from the baseline from which the breadth of the territorial sea is measured<sup>3</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 33 para 1. The zone remains part of, and subject to the local regime of, the high seas or (if an exclusive economic zone is claimed) the exclusive economic zone; and the establishment of a contiguous zone does not confer jurisdiction of the coastal state for any purposes other than those stated in arts 33 and 303. There is no provision for the establishment of contiguous zones for purposes of security, nor does art 33 confer exclusive fishing rights. The United Kingdom does not claim a contiguous zone. As to fishery zones and the United Kingdom fishery limits see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 961.

2 See the United Nations Convention on the Law of the Sea art 303. The United Kingdom legislation on underwater archaeology is confined in its application to the territorial sea: see the Protection of Wrecks Act 1973; the National Heritage Act 2002; and **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 1064 et seq. As to the territorial sea see PARA 123.

3 United Nations Convention on the Law of the Sea art 33 para 2. As to the method of measuring the territorial sea see PARA 123 et seq. Unlike the Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958; TS 3 (1965); Cmnd 2511) art 24 para 3, the United Nations Convention on the Law of the Sea contains no provision regarding the boundary between the contiguous zones of opposite or adjacent state.



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#### **154. Exclusive economic zones and exclusive fishery zones.**

The United Nations Convention on the Law of the Sea<sup>1</sup> provides for the establishment by coastal states of an exclusive economic zone<sup>2</sup>, whose legal status is sui generis, being neither territorial sea<sup>3</sup> nor high seas<sup>4</sup>. The inner limit of the exclusive economic zone is the outer limit of the territorial sea<sup>5</sup> and its outer limit is 200 nautical miles from the baselines from which the territorial sea is measured<sup>6</sup>.

The delimitation of the exclusive economic zone between states with opposite or adjacent coasts is to be effected by agreement in order to achieve an equitable solution<sup>7</sup>.

The rights and duties of the coastal state in respect of its exclusive economic zone include sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea bed and of the sea bed and its subsoil<sup>8</sup>; and jurisdiction with respect to: (1) the establishment and use of artificial islands, installations and structures<sup>9</sup>; (2) marine scientific research<sup>10</sup>; and (3) the protection and preservation of the marine environment<sup>11</sup>. In exercising its rights and performing its duties under the United Nations Convention on the Law of the Sea in the exclusive economic zone, the coastal state must have due regard to the rights and duties of other states and must act in a manner compatible with the Convention<sup>12</sup>. The coastal state's rights and limitations thereon are specifically regulated<sup>13</sup>, in particular as concerns (a) the exclusive right to construct and regulate the construction of artificial islands, installations and structures and safety zones round them<sup>14</sup>; (b) the conservation and utilisation of the living resources, including the determination of the allowable catch<sup>15</sup>; (c) rights relating to 'straddling' stocks<sup>16</sup> and highly migratory species<sup>17</sup>; and (d) rights relating to marine mammals<sup>18</sup>, anadromous stocks<sup>19</sup> and catadromous species<sup>20</sup>.

In the exclusive economic zone, states other than the coastal states enjoy, in so far as they are compatible with the provisions of the Convention concerning the exclusive economic zone, the freedoms they enjoy in the high seas<sup>21</sup>, in particular, the rights of navigation and overflight, the right to lay submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms<sup>22</sup>. In exercising their rights and performing their duties under the United Nations Convention on the Law of the Sea, such states must have due regard to the rights and duties of coastal states and comply with the regulations of those states<sup>23</sup>. Specific provision is made for the rights of land-locked and geographically disadvantaged states<sup>24</sup>, and for the restriction of the transfer of rights<sup>25</sup>.

Conflicts between the interests of the coastal state and those of any other state in cases where the United Nations Convention on the Law of the Sea does not attribute rights or jurisdiction to the coastal state or to other states should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole<sup>26</sup>.

Some states, including the United Kingdom, have not claimed an exclusive economic zone but have asserted some (though not all) of the legal competences associated with an exclusive economic zone, typically by establishing a 200 nautical mile exclusive fishery zone<sup>27</sup>.

1    I.e. the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) Pt V (arts 55-75). In the exclusive economic zone, unlike the continental shelf, the coastal state has

jurisdiction over the resources both of the seabed and of the superjacent waters, and in addition jurisdiction in respect of pollution, scientific research and the establishment of installations etc.

2 There is no exclusive economic zone established as such in the waters around the United Kingdom (although the United Kingdom proclaimed a 200 nautical mile zone around South Georgia and the South Sandwich Islands in 1993 (see the United Kingdom and Northern Ireland Proclamation (Maritime Zone) No 1 of 1993) and a 200 nautical mile exclusive economic zone around Pitcairn, Henderson, Ducie and Oeno Islands in 1997 (see the United Kingdom Proclamation establishing an Exclusive Economic Zone (Pitcairn, Henderson, Ducie and Oeno Islands) No 1 of 1997). In the waters around the United Kingdom, the United Kingdom and the European Union (which has legal competence in fisheries matters, as to which see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 796; and Case C-459/03 *Commission of the European Communities v Ireland* [2006] ECR I-4635, [2006] All ER (EC) 1013, [2006] All ER (D) 14 (Jun), ECJ) claim a 200-mile exclusive fishery zone. In addition, the United Kingdom asserts jurisdiction over matters of marine pollution in waters over designated areas of the United Kingdom continental shelf (as to which see PARA 172) and within United Kingdom fishery limits (as to which see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 961): see the Food and Environment Protection Act 1985; and **SHIPPING AND MARITIME LAW**.

3 As to the territorial sea see PARA 123 et seq.

4 As to the high seas see PARA 147 et seq.

5 le 12 nautical miles: PARA 124.

6 United Nations Convention on the Law of the Sea art 57. The outer limit of the exclusive economic zone must be shown on charts to which due publicity is given: see the United Nations Convention on the Law of the Sea art 75. As to baselines see PARAS 125-126.

7 United Nations Convention on the Law of the Sea art 74(1). The position concerning the delimitation of the exclusive economic zone is essentially the same as that concerning the delimitation of the continental shelf, as to which see PARA 163.

8 United Nations Convention on the Law of the Sea art 56 para 1(a). By virtue of this provision the rights of a coastal state over its exclusive economic zone duplicate its rights over its continental shelf in so far as the continental shelf lies within 200 nautical miles of the baseline. As to the continental shelf see PARA 163 et seq.

9 United Nations Convention on the Law of the Sea art 56 para 1(b)(i). The coastal state's jurisdiction in this regard is exclusive. As to artificial islands, installations and structures on the continental shelf see PARA 170.

10 United Nations Convention on the Law of the Sea art 56 para 1(b)(ii). As to marine scientific research see Pt XIII (arts 238-265); and PARA 194.

11 United Nations Convention on the Law of the Sea art 56 para 1(b)(iii). As to protection of the marine environment see Pt XII (arts 192-237); and PARA 193.

12 United Nations Convention on the Law of the Sea art 56 para 2. The rights contained in art 56 with respect to the seabed and subsoil must be exercised in accordance with Pt VI (arts 76-85) (as to which see PARA 163 et seq); art 56 para 3.

13 See the United Nations Convention on the Law of the Sea arts 60-71.

14 See the United Nations Convention on the Law of the Sea art 60.

15 See the United Nations Convention on the Law of the Sea arts 61, 62.

16 See the United Nations Convention on the Law of the Sea art 63. See also the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995; Misc 12 (1995); Cm 3125; 2167 UNTS 88).

17 United Nations Convention on the Law of the Sea art 64. See also the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. The provisions of the United Nations Convention on the Law of the Sea Pt V (arts 55-75) do not apply to sedentary species, which are governed by the provisions on the resources of the continental shelf (as to which see PARA 163): art 68.

18 United Nations Convention on the Law of the Sea art 65.

19 United Nations Convention on the Law of the Sea art 66.

- 20 United Nations Convention on the Law of the Sea art 67.
- 21 United Nations Convention on the Law of the Sea art 87; and see PARA 147.
- 22 United Nations Convention on the Law of the Sea art 58 para 1. As to the right to lay submarine cables and pipelines see PARA 169. The provisions of the United Nations Convention on the Law of the Sea Pt VII (arts 86-115) apply to the exclusive economic zone in so far as they are not incompatible with Pt V: art 58 para 2.
- 23 United Nations Convention on the Law of the Sea art 58 para 3. As to enforcement of the laws and regulations of the coastal state see art 73.
- 24 United Nations Convention on the Law of the Sea arts 69, 70. However, arts 69, 70 do not apply to a coastal state whose economy is overwhelmingly dependent on the exploitation of the living resources of its exclusive economic zone: art 71.
- 25 See the United Nations Convention on the Law of the Sea art 72.
- 26 United Nations Convention on the Law of the Sea art 59.
- 27 See note 2.

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## **(ii) Piracy**

### **155. Piracy in international law.**

By customary international law, a pirate is subject to universal jurisdiction<sup>1</sup>: any state that seizes a pirate may try him for an offence under its own municipal law. A pirate ship or aircraft may be stopped by the ships or aircraft of other states, and a pirate ship may be boarded on the high seas by the warship of any state<sup>2</sup>.

<sup>1</sup> For the principles of international jurisdiction over criminal offences and offenders generally see PARAS 143-233.

<sup>2</sup> Suspicion that a ship is a pirate ship is one of the exceptional cases in which a warship is justified in exercising the right of visit over a foreign merchant vessel on the high seas: see the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 110 para 1(a); and PARA 148.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(ii) Piracy/156. Meaning of 'piracy'.

### 156. Meaning of 'piracy'.

Piracy in international law (piracy jure gentium) is defined by the United Nations Convention on the Law of the Sea<sup>1</sup>, and this definition forms part of United Kingdom domestic law<sup>2</sup>. According to the Convention, piracy consists of the following acts:

- 27 (1) any illegal acts of violence or detention, or any act of depredation<sup>3</sup>, committed for private ends<sup>4</sup> by the crew or the passengers of a private ship or a private aircraft, and directed (a) on the high seas, against another<sup>5</sup> ship or aircraft, or against persons or property on board such ship or aircraft; or (b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state<sup>6</sup>;
- 28 (2) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft<sup>7</sup>; or
- 29 (3) any act of inciting or intentionally facilitating an act described in head (1) or head (2) above<sup>8</sup>.

The acts described in heads (1), (2) and (3) above, if committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft, are assimilated to acts committed by a private ship or aircraft<sup>9</sup>. A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for any of the acts which constitute piracy<sup>10</sup>. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act<sup>11</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) arts 101-103.

2 For the purposes of any proceedings before a court in the United Kingdom in respect of piracy, the United Nations Convention on the Law of the Sea arts 101-103, which are set out in the Merchant Shipping and Maritime Security Act 1997 s 26, Sch 5, are to be treated as part of the law of nations: s 26(1); and see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1249. As to the jurisdiction of the English courts see PARA 159. English courts have in the past attempted definitions of piracy jure gentium. References to some cases in which this has been done appear in the following paragraphs, but they must now be read in the light of the Merchant Shipping and Maritime Security Act 1997.

3 This may include a frustrated attempt to commit a piratical robbery: *Re Piracy Jure Gentium* [1934] AC 586, 3 BILC 836, PC disapproving the charge to the grand jury in *R v Dawson* (1696) 13 State Tr 451 at 454 in so far as it suggested that actual robbery was essential. In *A-G for Colony of Hong Kong v Kwok-a-Sing* (1873) LR 5 PC 179 at 199-200, 3 BILC 812 it was said that piracy is merely robbery on the high seas.

4 The term 'private ends' is not defined. It appears to embrace acts done without authorisation from the government of any state: *Re Piracy Jure Gentium* [1934] AC 586 at 599-600, 3 BILC 836, PC. As to the position of insurgents see *Re Piracy Jure Gentium* at 595; *The Magellan Pirates* (1853) 1 Ecc & Ad 81, 3 BILC 796; *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785, 3 BILC 825, CA.

5 It appears that at least two vessels must be involved and consequently, whatever the earlier position, under the definition in the United Nations Convention on the Law of the Sea art 101(a) when upon the high seas, acts done solely upon a single vessel and against the authority of that ship or persons or property on board is not now piracy in international law. As to the earlier position see *Re Piracy Jure Gentium* [1934] AC 586, PC; *A-G for Colony of Hong Kong v Kwok-a-Sing* (1873) LR 5 PC 179, 37 JP 772. Consequently the hijacking of a vessel by members of its crew or passengers may not constitute piracy. However the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 10 March 1988; TS 64 (1995); Cm 2947) is prospectively amended by the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 14 October 2005 to make provision for action against a wider range of offences, including the hijacking of ships.

6 United Nations Convention on the Law of the Sea art 101(a). By 'place outside the jurisdiction of any state' the International Law Commission (whose draft proposals formed the basis of the Convention) had chiefly in mind acts committed by persons connected with a ship or aircraft on an island constituting terra nullius or on the shores of an unoccupied territory: see YILC 1956 vol II, 282, Commentary para (3). Some states consider that Antarctica is a place outside the jurisdiction of any state: as to Antarctica see PARA 218. From the definition of 'piracy' in the United Nations Convention on the Law of the Sea art 101 it seems to follow that piracy connotes only acts committed upon or over the high seas or a place outside the jurisdiction of any state. Thus, whatever the position may be under municipal law, piracy in international law does not include theft of a tug tied to a wharf (see *Britannia Shipping Corp v Globe and Rutgers Fire Insurance Co* 244 NYS 720 at 723 (1930)) or of a ship in a river (see *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785 at 799, 3 BILC 825, CA), nor does it include any act done in territorial waters (cf *Cameron v HM Advocate* 1971 SLT 333 at 335-336 per Lord Walker). It has been held that if the initial act of depredation takes place in internal waters the subsequent cruising on the high seas by the actors in such circumstances as to give them the character of *hostes humani generis* is piracy: see *The Magellan Pirates* (1853) 1 Ecc & Ad 81, 3 BILC 796; *The Serhassan Pirates* (1845) 2 Wm Rob 354, 3 BILC 778.

7 United Nations Convention on the Law of the Sea art 101(b).

8 United Nations Convention on the Law of the Sea art 101(c).

9 United Nations Convention on the Law of the Sea art 102. Otherwise, if committed by a properly commissioned warship, such acts cannot amount to piracy, though the acts of the ship might give rise to the international responsibility of the flag state to other states: see *The Magellan Pirates* (1853) 1 Ecc & Ad 81, 3 BILC 796.

10 United Nations Convention on the Law of the Sea art 103.

11 United Nations Convention on the Law of the Sea art 103.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(ii) Piracy/157. Rights and obligations of states.

### **157. Rights and obligations of states.**

All states are under an obligation to co-operate in the repression of piracy<sup>1</sup>. Any state may seize a pirate ship or aircraft or a ship taken by piracy and under the control of pirates and arrest the persons and seize the property on board<sup>2</sup>. The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith<sup>3</sup>. A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect<sup>4</sup>. If a seizure on suspicion of piracy is made without adequate grounds, the state making the seizure is liable to the state whose nationality is possessed by the ship or aircraft for any loss or damage caused by the seizure<sup>5</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 100. As to the meaning of 'piracy' see PARA 156.

2 United Nations Convention on the Law of the Sea art 105.

3 United Nations Convention on the Law of the Sea art 105. See the explanation offered in the *Lotus Case* PCIJ Ser A No 10 at 70 (1927) per Moore J. For rights in property taken possession of from pirates by British ships see the Piracy Act 1850 s 5.

4 United Nations Convention on the Law of the Sea art 107.

5 United Nations Convention on the Law of the Sea art 106.

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**158. Nationality of pirate ships and aircraft.**

A ship or aircraft which has become a pirate ship or aircraft does not for that reason alone lose its nationality. The retention or loss of nationality is determined by the law of the state from which such nationality was derived<sup>1</sup>.

<sup>1</sup> United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 104. As to the nationality of ships see PARA 395; and **SHIPPING AND MARITIME LAW**.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(ii) Piracy/159. Jurisdiction of English courts.

### 159. Jurisdiction of English courts.

The English courts<sup>1</sup> have jurisdiction to try all cases of piracy *jure gentium* in whatever part of the high seas and upon whosoever's property it may be committed, and whether the accused are British subjects or the subjects of any foreign state with whom Her Majesty is at amity<sup>2</sup>.

If the act of depredation was committed, even without the Queen's commission, upon a subject of a state at enmity with Her Majesty, this does not amount to piracy; but it is piracy for a person who holds her commission to despoil those with whom his commission does not authorise him to fight, if they are at amity with Her Majesty<sup>3</sup>.

The place where the alleged piracy was committed must be within the jurisdiction of the Admiral<sup>4</sup>, although the ordinary rule that an indictment will not lie in an English court for an offence committed at sea beyond the limits of the territorial waters on board a foreign vessel by a foreigner does not apply to such a case<sup>5</sup>.

1 Jurisdiction is vested in the Crown Court: see the Senior Courts Act 1981 s 46(2). The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

2 1 Hawk PC c 20, s 1; *R v Dawson* (1696) 13 State Tr 451 at 455. For the purposes of any proceedings in respect of piracy the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) arts 101-103 (see PARA 156) are to be treated as part of the law of nations. Any court in the United Kingdom having jurisdiction in respect of piracy committed on the high seas has jurisdiction in respect of piracy committed by or against an aircraft, wherever that piracy is committed: Aviation Security Act 1982 s 5(1). See also **AIR LAW** vol 2 (2008) PARA 623; **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1057-1058; and note 4.

3 4 Co Inst 154; Charge of Sir Leoline Jenkins (see 1 Life of Sir Leoline Jenkins xciv); see *Re Tivnan* (1864) 5 B & S 645, 5 BILC 407.

4 3 Co Inst 113; 1 Hawk PC c 20, s 15; *R v Allen* (1837) 1 Mood CC 494, 3 BILC 573, CCR; *R v Anderson* (1868) LR 1 CCR 161 at 169, 3 BILC 40; *R v Carr and Wilson* (1882) 10 QBD 76, 3 BILC 593, CCR.

5 *R v Keyn* (1876) 2 ExD 63, 2 BILC 701, CCR; *R v Anderson* at 169. For the extent of Admiralty jurisdiction see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**; **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 79 et seq.

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**160. Punishment.**

Whoever with intent to commit, or at the time of or immediately before or after committing, the crime of piracy in respect of any ship, assaults with intent to murder any person on board the ship, or who stabs, cuts or wounds any such person, or unlawfully does any act whereby the life of such person may be endangered, must on conviction be sentenced to imprisonment for life<sup>1</sup>.

<sup>1</sup> Piracy Act 1837 s 2 (amended by the Statute Law Revision (No 2) Act 1888; Criminal Law Act 1967 s 10(2), Sch 3 Pt III; Crime and Disorder Act 1998 s 36(5)). As to the condemnation of property captured from pirates and the restitution to owners see the Piracy Act 1850 s 5; and see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 139.

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### **(iii) Hot Pursuit**

#### **161. Hot pursuit.**

The United Nations Convention on the Law of the Sea stipulates certain conditions that must be fulfilled if hot pursuit is to be lawful<sup>1</sup>. The hot pursuit of a foreign ship on the high seas may be undertaken when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that state<sup>2</sup>. The right arises whenever the ship or its authorities could have been apprehended in the territorial sea wherein the ship has subjected itself to the local jurisdiction<sup>3</sup>.

Pursuit must be commenced when the foreign ship, or one of its boats, is within the internal waters<sup>4</sup>, the territorial waters<sup>5</sup> or the contiguous zone<sup>6</sup> of the pursuing state<sup>7</sup>. The ship itself need not be in the territorial sea or the contiguous zone, provided that, if it is not, one of its boats or other craft working as a team and using the ship pursued as a mother ship is within those areas<sup>8</sup>. Nor is it necessary that at the time when the foreign ship within the territorial sea or contiguous zone receives the order to stop, the ship giving the order is itself within those areas; it may be upon the high seas outside those limits<sup>9</sup>. Hot pursuit is only deemed to begin when the pursuing ship has satisfied itself by such practicable means as are available as to the whereabouts of the vessel pursued and may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship<sup>10</sup>.

The right of hot pursuit may be exercised by warships or military aircraft<sup>11</sup>. Where the pursuit is effected by an aircraft, in addition to the requirements previously stated, the aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal state, summoned by the aircraft, arrives to take over the pursuit. The ship pursued must be ordered to stop and be pursued either by the aircraft which sighted it, or by other aircraft or ships which continue pursuit without interruption; arrest on the high seas is not justified sufficiently by the fact that the ship was sighted as an offender by the aircraft<sup>12</sup>.

These requirements are express and cumulative<sup>13</sup>. Courts in certain jurisdictions have, however, taken a flexible view, upholding the validity of arrests in circumstances where some of the conditions have not been met<sup>14</sup>. The right ceases<sup>15</sup> as soon as the ship pursued enters the territorial sea of its own state or of a third state<sup>16</sup>. Where a ship has been stopped or arrested on the high seas in circumstances which do not justify its pursuit, it must be compensated for any loss or damage that may have been sustained<sup>17</sup>. The pursuing state may use necessary and reasonable force in order to board, search, seize and bring into port the suspected vessel, and if sinking should occur incidentally, it might be blameless<sup>18</sup>. If fire is opened, there must first be a shot across the bow; there must be no greater danger to life than necessary, and a warship of the flag of the vessel pursued may protect it against excessive use of force<sup>19</sup>.

1 See the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 111. Hot pursuit is not defined in the United Nations Convention on the Law of the Sea but is understood to mean the continuous pursuit of a foreign ship by military vessels or aircraft of a coastal state, beginning in waters under the jurisdiction of the coastal state and ending in the arrest of the pursued ship on the high seas.

2 United Nations Convention on the Law of the Sea art 111 para 1. See also *The 'I'm Alone'* 3 RIAA 1609 (1935); *The M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* ITLOS Reports 1999, 10, 120 ILR 143.

- 3 *R v The North* (1905) 11 Ex CR 141. Hot pursuit may also be exercised in case of violations of laws in the contiguous zone or continental shelf or exclusive economic zone: see note 6.
- 4 As to internal waters see PARA 121. Pursuit may also be commenced when in archipelagic waters. As to the internal waters of archipelagic states see the United Nations Convention on the Law of the Sea art 50.
- 5 As to territorial waters see PARA 123.
- 6 As to the contiguous zone see PARA 153. If the vessel is in the contiguous zone pursuit may only be undertaken if there has been a violation of a right for the protection of which the zone was established: United Nations Convention on the Law of the Sea art 111 para 1. Thus, it is limited in such case to the pursuit of ships which have violated laws adopted by the coastal state concerning customs, fiscal, immigration or sanitary matters or the protection of objects of an archaeological and historical nature found at sea of the coastal state: see PARA 153; United Nations Convention on the Law of the Sea arts 33, 303. Hot pursuit applies mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal state applicable thereto: art 111 para 2. As to the exclusive economic zone see PARA 154. As to the continental shelf see PARA 163 et seq.
- 7 United Nations Convention on the Law of the Sea art 111 para 1. As to the doctrine of constructive presence see PARA 162.
- 8 United Nations Convention on the Law of the Sea art 111 para 4. Canadian courts have adopted a wide interpretation of the concept of the 'mother ship': see *R v Sunila and Soleyman* (1986) 28 DLR (4th) 450, (1987) 78 NSR (2d) 24.
- 9 United Nations Convention on the Law of the Sea art 111 para 1.
- 10 United Nations Convention on the Law of the Sea art 111 para 4. On a strict interpretation of the United Nations Convention on the Law of the Sea a signal by radio would not suffice. But see *R v Mills* (1995, unreported), Croydon Crown Court, W Gilmore, *Hot Pursuit: The Case of R v Mills and Others* (1995) 44 ICLQ 949.
- 11 United Nations Convention on the Law of the Sea art 111 para 5. It may also be exercised by other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect: art 111 para 5. This would include police vessels or customs or coastguard ships. The ship or aircraft which finally effects the arrest need not be the same as the one which began it, provided it is in fact a continuation of the pursuit: cf art 111 para 6(b). The release of a ship arrested in the jurisdiction of a state and escorted to a port of that state for the purposes of an inquiry cannot be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary: art 111 para 7.
- 12 United Nations Convention on the Law of the Sea art 111 para 6(b).
- 13 *The M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* ITLOS Reports 1999, 10, 120 ILR 143.
- 14 See *R v Sunila and Soleyman* (1986) 28 DLR (4th) 450, (1987) 78 NSR (2d) 24; *United States v Postal et al* 589 F 2d 862 (USA 5th Cir 1979), certificate denied 444 US 832 (1979); *R v Mills* (1995, unreported), Croydon Crown Court, W Gilmore *Hot Pursuit: The Case of R v Mills and Others* (1995) 44 ICLQ 949. But see *R v Charrington* (1999, unreported), Bristol Crown Court, W Gilmore *Drug Trafficking at Sea: The Case of R v Charrington and Others* (2000) 49 ICLQ 477.
- 15 Ie the right terminates; it is not merely suspended so as to permit resumption of pursuit if the ship re-emerges on the high seas.
- 16 United Nations Convention on the Law of the Sea art 111 para 3. Pursuit continued in the territorial sea of another state would engage the international responsibility of the pursuing state: *The Itata* (1892) Moore Int Arb 3067.
- 17 United Nations Convention on the Law of the Sea art 111 para 8.
- 18 See *The 'I'm Alone'* 3 RIAA 1609 at 1615 (1935) where the sinking was, however, held to have been unjustified.
- 19 *The Red Crusader* (1962) 35 Int LR 485 (Anglo-Danish Commission of Inquiry).

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**162. Constructive presence.**

A ship may be arrested on the high seas if at the time of arrest it is engaged in illegal action within the territorial sea or on land<sup>1</sup>. The distinction between constructive presence and hot pursuit<sup>2</sup> is that under the former doctrine an offending vessel outside the jurisdiction of the coastal state is treated as being within the jurisdiction of that state for the purpose of determining whether an offence has been committed, whereas the latter permits the arrest of ships outside the jurisdiction of the coastal state in respect of offences committed within the jurisdiction of that state.

1 Eg where the vessel is outside the territorial sea, but is carrying on fishing in it by means of its boats (*The Araunah* (1888) Moore Int Arb 824) or where it is using its boats in order to smuggle goods on shore (*The Grace and Ruby* 283 F 475 (USA 1922)). See *R v Sunila and Soleyman* (1986) 28 DLR (4th) 450, (1987) 78 NSR (2d) 24.

2 As to hot pursuit see PARA 161.

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#### **(iv) The Continental Shelf**

##### **163. The continental shelf.**

Under the United Nations Convention on the Law of the Sea<sup>1</sup>, the coastal state exercises sovereign rights<sup>2</sup> over the continental shelf for the purpose of exploring it and exploiting its natural resources<sup>3</sup>. Thus, the coastal state does not possess territorial sovereignty over the continental shelf, but only certain sovereign rights for limited purposes<sup>4</sup>. These rights are exclusive in the sense that if the coastal state does not itself explore the continental shelf and exploit its resources no one may undertake such activities or make a claim to the shelf without the coastal state's express consent<sup>5</sup>. The rights of the coastal state over the continental shelf do not depend upon occupation, effective or notional, or upon any express proclamation<sup>6</sup>, and do not affect the legal status of the superjacent waters as high seas, or that of the air space above those waters<sup>7</sup>.

1 See under the United Nations Convention on the Law of the Sea, (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) Pt VI (arts 76-85). The origin of the legal doctrine of the continental shelf is generally traced to the proclamation by the United States of 1945, known as the Truman Proclamation. For the text of the proclamation see 4 Whiteman's Digest 756. In *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* ICJ Reports 1969, 3, the International Court of Justice was of the opinion that the doctrine of the continental shelf was part of customary international law and that the Convention on the Continental Shelf (Geneva, 29 April 1958; TS 39 (1964); Cmnd 2422) arts 1-3 were declaratory of it. The United Nations Convention on the Law of the Sea supersedes the Convention on the Continental Shelf. The latter remains in force between the United Kingdom and other states which are parties to it but not to the United Nations Convention on the Law of the Sea.

2 As to the exercise of these rights in the United Kingdom see the Continental Shelf Act 1964; and PARA 172.

3 United Nations Convention on the Law of the Sea art 77 para 1.

4 The Truman Proclamation claimed the continental shelf as 'appertaining to the United States, subject to its jurisdiction and control'.

5 United Nations Convention on the Law of the Sea art 77 para 2. The coastal state has the exclusive right to authorise and regulate drilling on the continental shelf: art 81. As to payments and contributions by the coastal state in respect of exploitation beyond 200 nautical miles see art 82.

6 United Nations Convention on the Law of the Sea art 77 para 3. See also *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* ICJ Reports 1969, 3 at 31.

7 United Nations Convention on the Law of the Sea art 78 para 1.

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**164. Meaning of 'continental shelf'.**

The continental shelf of a coastal state comprises the sea bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance<sup>1</sup>.

The continental margin comprises the submerged prolongation of the land mass of the coastal state, and consists of the sea bed and subsoil of the shelf, the slope and the rise, but does not include the deep ocean floor with its oceanic ridges or the subsoil thereof<sup>2</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 76 para 1. The continental shelf is thus a legal, and not a geological, concept. As to the baselines from which the territorial sea is measured see arts 5-14; and PARAS 125-126. As to the determination of the outer limits of the continental shelf see PARA 166.

2 United Nations Convention on the Law of the Sea art 76 para 3. Whenever a given submarine area does not constitute a natural extension of the land territory of a coastal state, even though it is nearer to it than to the territory of another state, it cannot be regarded as appertaining to it, at any rate in the face of a competing claim by a state of whose land territory it is to be regarded as a natural extension: *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) ICJ Reports 1969, 3 at 31.

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**165. Natural resources.**

The natural resources of the continental shelf<sup>1</sup> consist of the mineral and other non-living resources of the sea bed and subsoil together with living organisms belonging to sedentary species, which, at the harvestable stage, are either immobile on or under the sea bed or unable to move except in constant physical contact with the sea bed or the subsoil<sup>2</sup>.

1 As to the meaning of 'continental shelf' see PARA 164.

2 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) Pt VI (arts 76-85) art 77 para 4. The importance of the distinction between sedentary and non-sedentary species is greatly reduced by the fact that the Convention establishes the exclusive rights of the coastal state over all living resources (and other economic resources) within its 200 nautical mile exclusive economic zone: see PARA 154 et seq.



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### 166. Outer limit.

The coastal state must establish the outer edge of its continental margin<sup>1</sup> wherever it extends beyond 200 nautical miles from the baselines by either<sup>2</sup> (1) a line delineated by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope<sup>3</sup>; or (2) a line delineated by reference to fixed points not more than 60 nautical miles from the foot of the continental slope<sup>4</sup>. The fixed points either must not exceed 350 nautical miles from the baselines<sup>5</sup> or not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres<sup>6</sup>. Where the continental shelf extends beyond 200 nautical miles from the baselines, it must be delineated by straight lines not exceeding 60 nautical miles length, connecting fixed points, defined by co-ordinates of latitude and longitude<sup>7</sup>. States parties to the United Nations Convention on the Law of the Sea are obliged to submit information on the outer limits of the continental shelf to the Commission on the Limits of the Continental Shelf, and limits established by the state on the basis of the Commission's consequent recommendations are final and binding<sup>8</sup>.

1 As to the continental margin see the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 76 para 3; and see PARA 164.

2 United Nations Convention on the Law of the Sea art 76 para 4(a). As to the baselines from which the territorial sea is measured see arts 5-14; and PARAS 125-126.

3 United Nations Convention on the Law of the Sea art 76 para 4(a)(i). In the absence of evidence to the contrary, the foot of the continental slope is determined as the point of maximum change in the gradient at its base: see art 76 para 4(b).

4 United Nations Convention on the Law of the Sea art 76 para 4(a)(ii).

5 As to the baselines see note 2.

6 United Nations Convention on the Law of the Sea art 76 para 5. Special provision is made for submarine ridges: see art 76 para 6.

7 United Nations Convention on the Law of the Sea art 76 para 7. As to the procedure for the establishment of the outer limit of the continental shelf and to publicity see art 76 paras 8, 9.

8 See the United Nations Convention on the Law of the Sea art 76 para 8. The United Kingdom has made a number of notifications in relation to different areas of the continental shelf adjacent to British coasts: see the Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982. While compliance with Commission recommendations is sufficient to make a continental shelf limit final and binding as between states parties to the Convention it is doubtful, given the inherent rights of the coastal state over the continental shelf (as to which see the United Nations Convention on the Law of the Sea art 77 and PARA 163), whether such compliance is a necessary condition for the establishment of a final and binding limit.

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### 167. State boundaries.

Delimitation of the continental shelf between states with opposite or adjacent coast must be effected by them by agreement on the basis of international law in order to achieve an equitable solution<sup>1</sup>. Where there is already an agreement between the states concerned, questions of delimitation must be determined in accordance with its provisions<sup>2</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 83. This provision replaces the Convention on the Continental Shelf (Geneva, 29 April 1958 to 31 October; TS 39 (1964); Cmnd 2422) art 6 of which provided that the boundary was to be determined by agreement between the states concerned, failing which and in the absence of special circumstances, the boundary would be the median line or line of equidistance. The notion of an 'equitable result' has been examined in detail in several cases concerning maritime delimitation brought before the International Court of Justice or international arbitral tribunals: see eg *Maritime Delimitation in the Black Sea (Romania v Ukraine)* ICJ Reports 2009, 132; and *Continental Shelf (Libyan Arab Jamahiriya/Malta)* ICJ Reports 1985, 13. Decisions are greatly influenced by the particular coastal configurations in each case, and the jurisprudence is not easy to summarise. In broad terms, the general approach involves three stages: (1) the construction of a strictly geometrical provisional equidistance line, drawn from the nearest points on the two coasts; (2) the adjustment of that provisional line to take account of any factors (eg, concave coastlines or small offshore islands) that distort the effects of equidistance and tend to produce an inequitable result; and (3) checking that the resulting line does not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths of the states and the ratio between the relevant maritime area attributed to each of them: see *Maritime Delimitation in the Black Sea (Romania v Ukraine)* ICJ Reports 2009, 132.

2 Agreements on the delimitation of the continental shelf concluded by the United Kingdom and its neighbouring states are published in the UK Treaty Series and have been notified to the UN Department (DOALOS): for example the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Belgium relating to the delimitation of the continental shelf between the two countries (Brussels, 29 May 1991; TS 20 (1994); Cm 1735); the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark relating to the delimitation of the continental shelf between the two countries, (London, 3 March 1966; TS 35 (1967); Cmd 2973); the Agreement between the Government of the French Republic and the Government of the United Kingdom of Great Britain and Northern Ireland relating to the completion of the delimitation of the continental shelf in the southern North Sea (London, 23 July 1991; TS 46 (1992); Cm 1979); the Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland relating to the delimitation of the continental shelf under the North Sea between the two countries (London, 6 October 1965; TS 23 (1967); Cmd 3253); and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to the delimitation of the continental shelf between the two countries (London, 10 March 1965; TS 71 (1965); Cmnd 2757).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(iv) The Continental Shelf/168. Submarine cables and pipelines on the continental shelf.

**168. Submarine cables and pipelines on the continental shelf.**

All states are entitled to lay submarine cables and pipelines on the continental shelf<sup>1</sup>. Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources, and the prevention, reduction and control of pollution from pipelines, the coastal state may not impede the laying or maintenance of submarine cables or pipelines on the continental shelf<sup>2</sup>. The delineation of the course of such cables and pipelines across the continental shelf is subject to the consent of the coastal state<sup>3</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 79 para 1. The state laying cables or pipelines must pay due regard to those already in position: art 79 para 5. As to submarine cables, pipelines and installations beyond the continental shelf see art 112; and PARA 169. The Continental Shelf Act 1964 s 8 extends the provisions of the Submarine Telegraph Act 1885 to the continental shelf: see **TELECOMMUNICATIONS** vol 97 (2010) PARA 207 et seq.

2 United Nations Convention on the Law of the Sea art 79 para 2. The right is confined to cables and pipelines traversing the continental shelf. A coastal state may establish conditions for cables and pipelines that (1) enter its territory or territorial sea; or (2) are used in connection with the exploration of its continental shelf or the exploitation of its resources or the operation of offshore islands, installations and structures within its jurisdiction: art 79 para 4.

3 United Nations Convention on the Law of the Sea art 79 para 3.

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### **169. Submarine cables and pipelines on the bed of the high seas.**

All states may lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf<sup>1</sup>. Every state must legislate so as to make the breaking or injury by a ship flying its flag, or by a person subject to its jurisdiction<sup>2</sup>, of a submarine cable, wilfully or through culpable negligence, so as to impede telegraphic or telephonic communications, or the breaking or injury of a pipeline or high voltage power cable, a punishable offence<sup>3</sup>. Every state must legislate so as to ensure that persons subject to its jurisdiction who, being owners of a cable or pipeline, in laying or repairing it, cause a break in or injury to another cable or pipeline, bear the cost of the repairs<sup>4</sup>. Every state must legislate to ensure that owners of a cable or pipeline indemnify owners of ships who can prove that they have sacrificed an anchor, net or other fishing gear to avoid injuring a cable or pipeline, provided the owner of the ship has taken all reasonable precautionary measures beforehand<sup>5</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 112 para 1. The state laying cables or pipelines must pay due regard to those already in position: art 79 para 5 (applied by art 112 para 2). As to submarine cables, pipelines and installations on the continental shelf see art 79; and **PARA 168**.

2 Under the Convention for the Protection of Submarine Cables (Paris, 14 March 1884; 75 BFSP 356; C 5910) art 10 a state is authorised to board vessels of other parties to the Convention on suspicion of interfering with submarine cables. This Convention was implemented in England by the Submarine Telegraph Act 1885 s 2: see **TELECOMMUNICATIONS** vol 97 (2010) **PARA 207** et seq.

3 United Nations Convention on the Law of the Sea art 113. This does not apply to any break or injury caused by persons acting with the legitimate object of saving their own lives or ships, after having taken all necessary precautions: art 113. For the UK legislation see the Submarine Telegraph Act 1885 s 3; the Continental Shelf Act 1964 s 8; and **TELECOMMUNICATIONS** vol 97 (2010) **PARA 207**.

4 United Nations Convention on the Law of the Sea art 114. For the UK legislation see the Submarine Telegraph Act 1885 s 2; the Continental Shelf Act 1964 s 8; and **TELECOMMUNICATIONS** vol 97 (2010) **PARA 207**.

5 United Nations Convention on the Law of the Sea art 115. For the UK legislation see the Submarine Telegraph Act 1885 s 2; the Continental Shelf Act 1964 s 8; and **TELECOMMUNICATIONS** vol 97 (2010) **PARA 207**.

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### **170. Artificial islands, installations and structures.**

On its continental shelf<sup>1</sup>, the coastal state has the exclusive right to construct and to authorise and regulate the construction, operation and use of: (1) artificial islands<sup>2</sup>; (2) installations and structures for the purpose of exploring and exploiting, conserving and managing the natural resources and other economic purposes<sup>3</sup>; and (3) installations and structures which may interfere with the exercise of the rights of the coastal state<sup>4</sup>. The coastal state has exclusive jurisdiction over them, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations<sup>5</sup>. Due notice must be given of their construction, and permanent means for giving warning of their presence must be maintained<sup>6</sup>. The coastal state may, where necessary, establish reasonable safety zones<sup>7</sup> of a breadth to be established by the state but not, generally, exceeding a distance of 500 metres around them<sup>8</sup> which must be respected by all ships<sup>9</sup>. Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognised sea lanes essential to international navigation<sup>10</sup>. Artificial islands, installations and structures do not possess the status of islands<sup>11</sup> and accordingly do not generate territorial seas or other maritime zones.

Any installations or structures which are abandoned or disused must be removed, having due regard to fishing, the protection of the marine environment and the rights and duties of other states, to ensure safety of navigation<sup>12</sup>. Appropriate publicity must be given to the depth, position and dimensions of any installations or structures not entirely removed<sup>13</sup>.

1 As to the continental shelf see PARA 163. As to artificial islands, installations and structures in the exclusive economic zone see PARA 154.

2 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) arts 60 para 1(a), 80.

3 United Nations Convention on the Law of the Sea arts 60 para 1(b), 80.

4 United Nations Convention on the Law of the Sea arts 60 para 1(c), 80.

5 United Nations Convention on the Law of the Sea arts 60 para 2, 80. The United Nations Convention on the Law of the Sea does not define the term 'artificial island', 'installation' or 'structure'.

6 United Nations Convention on the Law of the Sea arts 60 para 3, 80.

7 United Nations Convention on the Law of the Sea arts 60 para 4, 80.

8 United Nations Convention on the Law of the Sea arts 60 para 5, 80. Wider zones may be established in accordance with generally accepted international standards or as recommended by the competent international organisation, which is the International Maritime Organization.

9 United Nations Convention on the Law of the Sea arts 60 para 6, 80.

10 United Nations Convention on the Law of the Sea arts 60 para 7, 80.

11 United Nations Convention on the Law of the Sea arts 60 para 8, 80. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf: arts 60 para 8, 80. As to the territorial sea and its delimitation see PARAS 123-126. As to the delimitation of the exclusive economic zone see PARA 154. As to the delimitation of the continental shelf see PARA 167.

12 United Nations Convention on the Law of the Sea arts 60 para 3, 80. The International Maritime Organization published Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone (Resolution A.672(16)) adopted on 19 October 1989.

13 United Nations Convention on the Law of the Sea arts 60 para 3, 80.

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**171. Tunnelling.**

The coastal state has the right to exploit the subsoil of the continental shelf by tunnelling<sup>1</sup>.

<sup>1</sup> See the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 85. The provisions of the United Nations Convention on the Law of the Sea are stipulated to be without prejudice to the right of a coastal state to exploit the subsoil of the sea bed irrespective of the depth of water above the subsoil, but this provision is a redundant survival of the legal regime established in the Convention on the Continental Shelf (Geneva, 29 April 1958; TS 39 (1964); Cmnd 2422) art 1 of which defined the continental shelf by a formula referring to the depth of the superjacent waters.

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## 172. United Kingdom legislation.

The Continental Shelf Act 1964 provides that any rights exercisable by the United Kingdom outside territorial waters<sup>1</sup> with respect to the sea bed and subsoil and their natural resources, except in so far as they are exercisable in relation to coal, are vested in the Crown<sup>2</sup>. The Secretary of State, on behalf of Her Majesty, may grant licences to search and bore for and get petroleum<sup>3</sup>. The rights to exploit coal are vested in the Coal Authority<sup>4</sup>. The foregoing provisions relate to the continental shelf: the exploitation of hard mineral resources<sup>5</sup> of the high seas beyond the continental shelf is regulated by the Deep Sea Mining (Temporary Provisions) Act 1981<sup>6</sup>. The Crown may designate the areas within which rights of exploitation are to be exercised<sup>7</sup>.

1 As to the territorial waters of the United Kingdom see PARA 124. As to the meaning of 'United Kingdom' see PARA 30 note 3.

2 See the Continental Shelf Act 1964 s 1(1); and **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1636.

3 See the Petroleum Act 1998 s 3(1); and **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1639. As to the Secretary of State see PARA 29.

4 See the Coal Industry Act 1994 s 8(1)(a); and **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARAS 67-69.

5 As to the meaning of 'hard mineral resources' see PARA 175 note 4.

6 See PARA 174.

7 See the Continental Shelf Act 1964 s 1(7); and **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1636.



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## **(v) The Deep Sea Bed**

### **173. The deep sea bed.**

The United Nations Convention on the Law of the Sea<sup>1</sup> prescribes a regime for the exploration of the deep sea bed, which is the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction and is known as the 'Area'<sup>2</sup>. The Area and its resources<sup>3</sup> are the common heritage of mankind<sup>4</sup>. States may not claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor may any state or natural or juridical person appropriate any part of it<sup>5</sup>. No such claim or exercise of sovereignty or sovereign rights or appropriation will be recognised<sup>6</sup>. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the International Seabed Authority acts<sup>7</sup>. These resources may not be alienated<sup>8</sup>. The minerals<sup>9</sup> recovered, however, may only be alienated in accordance with the Convention and the rules, regulations and procedures of the Authority<sup>10</sup>. No state or natural or juridical person may claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with the Convention<sup>11</sup>.

Nothing in the Convention nor rights granted or exercised under it affects the legal status of the waters superjacent to the Area or that of the air space above those waters<sup>12</sup>. Conduct of states in the Area must be in accordance with the Convention, the principles embodied in the Charter of the United Nations<sup>13</sup> and other rules of international law in the interests of maintaining peace and security and promoting international co-operation and mutual understanding<sup>14</sup>. States and international organisations are responsible for ensuring that activities in the Area comply with the Convention<sup>15</sup> and states may be liable for damage<sup>16</sup>. Activity in the Area must be carried out for the benefit of mankind as a whole<sup>17</sup> and the Area may only be used for peaceful purposes<sup>18</sup>.

A complex legal regime was established in Part XI of the Convention to implement these principles and to provide a legal framework for the development of the Area. Provision was made for safeguarding the rights and legitimate interests of coastal states<sup>19</sup>, marine scientific research<sup>20</sup>, transfer of technology<sup>21</sup>, protection of the marine environment<sup>22</sup> and human life<sup>23</sup>, the accommodation of activities in the Area and in the marine environment<sup>24</sup>, participation of developing states in the Area<sup>25</sup> and the preservation of archaeological and historical objects<sup>26</sup>. Provision was made for the settlement of disputes<sup>27</sup>.

The above regime was extensively modified by the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea<sup>28</sup>. The 1994 Agreement is designed to be consistent with a provisional regime established for deep seabed mining by a number of states including the United Kingdom, the United States of America (which is not a party to the United Nations Convention on the Law of the Sea), and practically all other states whose nationals might wish to engage in deep seabed mining in the foreseeable future<sup>29</sup>. This provisional regime (sometimes known as the 'reciprocating states regime') is based upon the principle of the reciprocal recognition of licences issued by a participating state for deep seabed mining in defined concession areas. The regime is implemented in the United Kingdom by the Deep Sea Mining (Temporary Provisions) Act 1981<sup>30</sup>.

1. The United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) Pt XI Sections 1, 2 (arts 133-149).

2 United Nations Convention on the Law of the Sea art 1 para 1. The Area thus consists of the seabed beyond the limits of the legal continental shelves appertaining to coastal states, as to which see PARA 163 et seq.

3 le all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the sea bed, including polymetallic nodules: United Nations Convention on the Law of the Sea art 133(a).

4 United Nations Convention on the Law of the Sea art 136.

5 United Nations Convention on the Law of the Sea art 137 para 1.

6 United Nations Convention on the Law of the Sea art 137 para 1.

7 United Nations Convention on the Law of the Sea art 137 para 2. As to the International Seabed Authority see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 12.

8 United Nations Convention on the Law of the Sea art 137 para 2.

9 le resources when recovered from the Area: United Nations Convention on the Law of the Sea art 133(b).

10 United Nations Convention on the Law of the Sea art 137 para 2.

11 United Nations Convention on the Law of the Sea art 137 para 3.

12 United Nations Convention on the Law of the Sea art 135. The superjacent waters are high seas.

13 Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015).

14 See the United Nations Convention on the Law of the Sea art 138.

15 See the United Nations Convention on the Law of the Sea art 139 para 1.

16 See the United Nations Convention on the Law of the Sea art 139 para 2.

17 United Nations Convention on the Law of the Sea art 140.

18 United Nations Convention on the Law of the Sea art 141.

19 See the United Nations Convention on the Law of the Sea art 142.

20 See the United Nations Convention on the Law of the Sea art 143.

21 See the United Nations Convention on the Law of the Sea art 144.

22 See the United Nations Convention on the Law of the Sea art 145.

23 See the United Nations Convention on the Law of the Sea art 146.

24 See the United Nations Convention on the Law of the Sea art 147.

25 See the United Nations Convention on the Law of the Sea art 148.

26 See the United Nations Convention on the Law of the Sea art 149.

27 See PARA 490 et seq.

28 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994; UKTS 82 (1999), Cm 4525). There is no practical possibility of the original regime in Part XI of the United Nations Convention on the Law of the Sea being implemented.

29 See the Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Sea Bed (Washington, 2 September 1982; TS 46 (1982); Cmnd 8685); Provisional Understanding on Deep Sea Matters (Geneva, 3 August 1984; TS 24 (1985); Cmnd 9536).

30 As to the Deep Sea Mining (Temporary Provisions) Act 1981 see PARA 174 et seq.

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#### **174. Deep sea mining.**

Before the conclusion of the United Nations Convention of the Law of the Sea<sup>1</sup>, several states enacted legislation and entered into international agreements for the avoidance of conflicts over deep sea mining areas<sup>2</sup>. In 1981, the United Kingdom enacted the Deep Sea Mining (Temporary Provisions) Act 1981 to make provision for deep sea mining operations<sup>3</sup>. If it appears to the Secretary of State that an international agreement on the law of the sea which has been adopted by a United Nations Conference on the law of the sea is to be given effect within the United Kingdom, the Secretary of State may by order provide for the repeal of the Deep Sea Mining (Temporary Provisions) Act 1981<sup>4</sup>.

1 The United Nations Convention on the Law of the Sea (New York, 10 December 1982; TS 81 (1999); Cmnd 4524).

2 Eg the Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Sea Bed (Washington, 2 September 1982; TS 46 (1982); Cmnd 8685); Provisional Understanding on Deep Sea Matters (Geneva, 3 August 1984; TS 24 (1985); Cmnd 9536).

3 Deep Sea Mining (Temporary Provisions) Act 1981 preamble, s 18(1). The Act applies to Northern Ireland: s 18(7). Her Majesty may by Order in Council direct that any of the provisions of the Act are to extend, with such modifications (if any) as may be specified in the order, to the Channel Islands, the Isle of Man or any colony: s 18(6). In exercise of this power the following orders have been made: Deep Sea Mining (Temporary Provisions) Act 1981 (Guernsey) Order 1997, SI 1997/2978; Deep Sea Mining (Temporary Provisions) Act 1981 (Jersey) Order 1997, SI 1997/2979; Deep Sea Mining (Temporary Provisions) Act 1981 (Isle of Man) Order 2000, SI 2000/1112.

4 Deep Sea Mining (Temporary Provisions) Act 1981 s 18(3). The order may contain such incidental, supplementary and transitional provisions as the Secretary of State thinks fit: s 18(5). At the date at which this volume states the law, no such order had been made. As to the Secretary of State see PARA 29.

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### **175. Prohibition of unlicensed deep sea mining.**

Exploration<sup>1</sup> or exploitation<sup>2</sup> of any part of the deep sea bed<sup>3</sup> for hard mineral resources<sup>4</sup> without a licence is prohibited<sup>5</sup> and any person who does so is guilty of an offence<sup>6</sup>. This applies to any person who is a United Kingdom national<sup>7</sup>, a Scottish firm or a body incorporated under the law of any part of the United Kingdom, and is resident in any part of the United Kingdom<sup>8</sup>. In any proceedings, a certificate issued by the Secretary of State certifying that sovereign rights are not exercisable in relation to any part of the sea bed by the United Kingdom or by any other sovereign power will be conclusive as to that fact<sup>9</sup>. Her Majesty may by Order in Council extend the application of the prohibition of unlicensed deep sea mining<sup>10</sup>.

1 'Exploration', in relation to the hard mineral resources (see note 4) of any part of the deep sea bed (see note 3), means the investigation of that part of the deep sea bed for the purpose of ascertaining whether or not the hard mineral resources of that part of the deep sea bed can be commercially exploited: Deep Sea Mining (Temporary Provisions) Act 1981 s 17.

2 'Exploitation' means commercial exploitation: Deep Sea Mining (Temporary Provisions) Act 1981 s 17.

3 'Deep sea bed' means that part of the bed of the high seas in respect of which sovereign rights in relation to the natural resources of the sea bed are neither exercisable by the United Kingdom nor recognised by Her Majesty's Government in the United Kingdom as being exercisable by another sovereign power or, in a case where disputed claims are made by more than one sovereign power, by one or other of those sovereign powers: Deep Sea Mining (Temporary Provisions) Act 1981 ss 1(6), 17. As to the meaning of 'United Kingdom' see PARA 30 note 3.

4 'Hard mineral resources' means deposits of nodules containing (in quantities greater than trace) at least one of the following elements: manganese, nickel, cobalt, copper, phosphorus and molybdenum: Deep Sea Mining (Temporary Provisions) Act 1981 ss 1(6), 17. As to minerals in general see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 12.

5 Deep Sea Mining (Temporary Provisions) Act 1981 s 1(1), (2).

6 Deep Sea Mining (Temporary Provisions) Act 1981 s 1(3). A person guilty of such an offence is liable, on conviction on indictment, to a fine; or, on summary conviction, to a fine not exceeding the statutory maximum: s 1(3)(a), (b). As to the supplementary provisions relating to offences under the Deep Sea Mining (Temporary Provisions) Act 1981 see PARA 187. As to the statutory maximum see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140.

7 'United Kingdom national' means: (1) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen; (2) a person who under the British Nationality Act 1981 is a British subject; or (3) a British protected person within the meaning of the British Nationality Act 1981: Deep Sea Mining (Temporary Provisions) Act 1981 s 1(6) (amended by the British Overseas Territories Act 2002 s 2(3); and SI 1986/948).

8 Deep Sea Mining (Temporary Provisions) Act 1981 s 1(4) (amended by the British Nationality Act 1981 s 52(6), Sch 7).

9 Deep Sea Mining (Temporary Provisions) Act 1981 s 1(7). Any document purporting to be such a certificate will be received in evidence and will, unless the contrary is proved, be deemed to be such a certificate: s 1(7).

10 Deep Sea Mining (Temporary Provisions) Act 1981 s 1(5). Her Majesty may extend the application to all United Kingdom nationals, Scottish firms and bodies incorporated under the law of any part of the United Kingdom who are resident outside the United Kingdom, or to such nationals, firms and bodies who are resident in any country specified in the order: s 1(5)(a) (amended by the British Nationality Act 1981 s 52(6)). Her Majesty may also extend the application to bodies incorporated under the law of any of the Channel Islands, the

Isle of Man, or any colony: Deep Sea Mining (Temporary Provisions) Act 1981 s 1(5)(b) (amended by the Statute Law (Repeals) Act 1995).

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## **176. Exploration and exploitation licences.**

The Secretary of State may, on payment of such a fee<sup>1</sup> as may with the consent of the Treasury be prescribed<sup>2</sup>, grant to such persons as he thinks fit licences for the exploration<sup>3</sup> or exploitation<sup>4</sup> of the deep sea bed<sup>5</sup> for hard mineral resources<sup>6</sup>, and in determining whether to grant a licence in any case he is to have regard to any relevant factors including, in particular, the desirability of keeping an area or areas of the deep sea bed free from deep sea bed mining operations<sup>7</sup> so as to provide an area or areas for comparison with licensed areas<sup>8</sup> in assessing the effects of such operations<sup>9</sup>. An exploration or an exploitation licence is granted for such period as the Secretary of State thinks fit and contains such terms and conditions as he thinks fit and, in particular, but without prejudice to the generality of the foregoing, a licence may include terms and conditions<sup>10</sup>: (1) relating to the safety, health or welfare of persons employed in the licensed operations<sup>11</sup> or in the ancillary operations<sup>12</sup>; (2) relating to the processing or other treatment of any hard mineral resources won in pursuance of the licence which is carried out by or on behalf of the licensee<sup>13</sup> on any ship<sup>14</sup>; (3) relating to the disposal of any waste material resulting from such processing or other treatment<sup>15</sup>; (4) requiring plans, returns, accounts or other records with respect to any matter connected with any licensed area or licensed operations or ancillary operations to be furnished to the Secretary of State<sup>16</sup>; (5) requiring samples of any hard mineral resources discovered or won in any licensed area, or assays of such samples, to be furnished to the Secretary of State<sup>17</sup>; (6) requiring any exploration or exploitation of the hard mineral resources of the licensed area to be diligently carried out<sup>18</sup>; (7) requiring the payment to the Secretary of State of such sums as may with the consent of the Treasury be prescribed at such times as may be prescribed<sup>19</sup>; and (8) permitting the transfer of the licence in prescribed cases or with the written consent of the Secretary of State<sup>20</sup>. Where the Secretary of State has granted an exploration licence he must not grant an exploitation licence in respect of any part of the licensed area otherwise than to the licensee except with the licensee's written consent<sup>21</sup>.

1 As to the fee payable for the grant of an exploration licence see the Deep Sea Mining (Exploration Licences) (Applications) Regulations 1982, SI 1982/58, reg 3. As to the additional fees payable see the Deep Sea Mining (Exploration Licences) Regulations 1984, SI 1984/1230, reg 5. As to the Secretary of State see PARA 29.

2 'Prescribed' means prescribed by regulations under the Deep Sea Mining (Temporary Provisions) Act 1981 s 12: s 17.

3 As to the meaning of 'exploration' see PARA 175 note 1. 'Exploration licence' means a licence authorising the licensee (see note 13) to explore for the hard mineral resources (see note 6) of such part of the deep sea bed (see note 5) as may be specified in the licence: Deep Sea Mining (Temporary Provisions) Act 1981 ss 2(1), 17. An exploration licence may not be granted in respect of any period before 1 July 1981: s 2(4).

4 As to the meaning of 'exploitation' see PARA 175 note 2. 'Exploitation licence' means a licence authorising the licensee to exploit the hard mineral resources of such part of the deep sea bed as may be specified in the licence: Deep Sea Mining (Temporary Provisions) Act 1981 ss 2(1), 17. An exploitation licence may not be granted in respect of any period before 1 January 1988: s 2(4).

5 As to the meaning of 'deep sea bed' see PARA 175 note 3.

6 As to the meaning of 'hard mineral resources' see PARA 175 note 4.

7 'Deep sea bed mining operations' means any exploration or exploitation of the hard mineral resources of the deep sea bed: Deep Sea Mining (Temporary Provisions) Act 1981 s 17.

8 'Licensed area' means any part of the deep sea bed in respect of which there is in force an exploration or exploitation licence: Deep Sea Mining (Temporary Provisions) Act 1981 s 17.

9 Deep Sea Mining (Temporary Provisions) Act 1981 s 2(2).

10 Deep Sea Mining (Temporary Provisions) Act 1981 s 2(3).

11 'Licensed operations' means any activities which the licensee may carry on by virtue of his licence: Deep Sea Mining (Temporary Provisions) Act 1981 s 17.

12 Deep Sea Mining (Temporary Provisions) Act 1981 s 2(3)(a). 'Ancillary operations', in relation to any licensed operations, means any activity carried on by or on behalf of the licensee which is ancillary to the licensed operations (including the processing and transportation of any substances recovered): s 17.

13 'Licensee' means the holder of an exploration or exploitation licence: Deep Sea Mining (Temporary Provisions) Act 1981 s 17.

14 Deep Sea Mining (Temporary Provisions) Act 1981 s 2(3)(b).

15 Deep Sea Mining (Temporary Provisions) Act 1981 s 2(3)(c).

16 Deep Sea Mining (Temporary Provisions) Act 1981 s 2(3)(d).

17 Deep Sea Mining (Temporary Provisions) Act 1981 s 2(3)(e).

18 Deep Sea Mining (Temporary Provisions) Act 1981 s 2(3)(f).

19 Deep Sea Mining (Temporary Provisions) Act 1981 s 2(3)(g).

20 Deep Sea Mining (Temporary Provisions) Act 1981 s 2(3)(h).

21 Deep Sea Mining (Temporary Provisions) Act 1981 s 2(5).

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### **177. Licences granted by reciprocating countries.**

Where, in the opinion of Her Majesty, the law of any country contains provisions similar in their aims and effects to the provisions of the Deep Sea Mining (Temporary Provisions) Act 1981, Her Majesty may by Order in Council designate that country as a reciprocating country<sup>1</sup>. Where a person holds a licence or other authorisation issued and for the time being in force under the law of a reciprocating country for the exploration<sup>2</sup> or exploitation<sup>3</sup> of the hard mineral resources<sup>4</sup> of any area of the deep sea bed<sup>5</sup> specified in that authorisation<sup>6</sup> the Secretary of State must not grant an exploration or exploitation licence in respect of any part of the authorised area<sup>7</sup> and if the relevant provision<sup>8</sup> applies to that person, he must not be prohibited from engaging in the exploration or, as the case may be, exploitation of the hard mineral resources of the authorised area<sup>9</sup>. It is the duty of the licensee<sup>10</sup> to exercise his rights under the licence with reasonable regard to the interests of other persons in their exercise of the freedom of the high seas<sup>11</sup>.

1 Deep Sea Mining (Temporary Provisions) Act 1981 s 3(1). In exercise of this power the following order was made: Deep Sea Mining (Reciprocating Countries) Order 1985, SI 1985/2000. 'Reciprocating country' means a country designated as such by an order under the Deep Sea Mining (Temporary Provisions) Act 1981 s 3: s 17.

2 As to the meaning of 'exploration' see PARA 175 note 1. As to the meaning of 'exploration licence' see PARA 176 note 3.

3 As to the meaning of 'exploitation' see PARA 175 note 1. As to the meaning of 'exploitation licence' see PARA 176 note 4.

4 As to the meaning of 'hard mineral resources' see PARA 175 note 4.

5 As to the meaning of 'deep sea bed' see PARA 175 note 3.

6 Deep Sea Mining (Temporary Provisions) Act 1981 s 3(2). Any reference to a reciprocal authorisation in the Deep Sea Mining (Temporary Provisions) Act 1981 is a reference to an authorisation within s 3(2): ss 3(3), 17. For the purposes of any proceedings, a reciprocal authorisation may be proved by the production of a copy of the authorisation certified to be a true copy by an official of the government or other body which issued the authorisation, and any document purporting to be such a copy is to be received in evidence and will, unless the contrary is proved, be deemed to be such an authorisation: s 3(4).

7 Deep Sea Mining (Temporary Provisions) Act 1981 s 3(2)(a). As to the Secretary of State see PARA 29.

8 In the Deep Sea Mining (Temporary Provisions) Act 1981 s 1: see PARA 175.

9 Deep Sea Mining (Temporary Provisions) Act 1981 s 3(2)(b). References in s 3(2)(b) to any person who holds a reciprocal authorisation include references to his agents or employees acting in their capacity as such: s 3(3).

10 As to the meaning of 'licensee' see PARA 176 note 13.

11 Deep Sea Mining (Temporary Provisions) Act 1981 s 7.



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**178. Prevention of interference with licensed operations.**

A person to whom the prohibition of unlicensed deep sea mining<sup>1</sup> applies must not intentionally interfere with any operations carried on in pursuance of an exploration<sup>2</sup> or exploitation licence<sup>3</sup> or a reciprocal authorisation<sup>4</sup>. Any person who contravenes this provision is guilty of an offence<sup>5</sup>.

1    le the prohibition in the Deep Sea Mining (Temporary Provisions) Act 1981 s 1: see PARA 175.

2    As to the meaning of 'exploration licence' see PARA 176 note 3.

3    As to the meaning of 'exploitation licence' see PARA 176 note 4.

4    Deep Sea Mining (Temporary Provisions) Act 1981 s 4(1). As to the meaning of 'reciprocal authorisation' see PARA 177 note 6.

5    Deep Sea Mining (Temporary Provisions) Act 1981 s 4(2). A person guilty of such an offence is liable, on conviction on indictment, to a fine; or, on summary conviction, to a fine not exceeding the statutory maximum: s 4(2)(a), (b). As to the statutory maximum see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140. As to the supplementary provisions relating to offences under the Deep Sea Mining (Temporary Provisions) Act 1981 see PARA 187.

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**179. Protection of the marine environment.**

In determining whether to grant an exploration<sup>1</sup> or exploitation licence<sup>2</sup> the Secretary of State must have regard to the need to protect (so far as reasonably practicable) marine creatures, plants and other organisms and their habitat from any harmful effects which might result from any activities to be authorised by the licence<sup>3</sup>. The Secretary of State must consider any representations made to him concerning such effects<sup>4</sup>.

1 As to the meaning of 'exploration licence' see PARA 176 note 3.

2 As to the meaning of 'exploitation licence' see PARA 176 note 4.

3 Deep Sea Mining (Temporary Provisions) Act 1981 s 5(1). Without prejudice to s 2(3) (see PARA 176), any exploration or exploitation licence granted by the Secretary of State must contain such terms and conditions as he considers necessary or expedient to avoid or minimise any such harmful effects: s 5(2). As to the Secretary of State see PARA 29.

4 Deep Sea Mining (Temporary Provisions) Act 1981 s 5(1).

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### **180. Variation and revocation of licences.**

The Secretary of State<sup>1</sup> may vary or revoke any exploration<sup>2</sup> or exploitation licence<sup>3</sup> where the variation or revocation is in his opinion required (1) to ensure the safety, health or welfare of persons engaged in any of the licensed operations<sup>4</sup> or ancillary operations<sup>5</sup>; or (2) to protect any marine creatures, plants or other organisms or their habitat<sup>6</sup>; or (3) in pursuance of foreign discriminatory action<sup>7</sup>; or (4) to avoid a conflict with any obligation of the United Kingdom arising out of any international agreement in force for the United Kingdom<sup>8</sup>. The Secretary of State may vary or revoke any exploration or exploitation licence in any case, with the consent of the licensee<sup>9</sup>. The Secretary of State may revoke an exploration or exploitation licence in any case where a term or condition of the licence or any regulation made under the Deep Sea Mining (Temporary Provisions) Act 1981 has not been complied with<sup>10</sup>.

1 As to the Secretary of State see PARA 29.

2 As to the meaning of 'exploration licence' see PARA 176 note 3.

3 As to the meaning of 'exploitation licence' see PARA 176 note 4.

4 As to the meaning of 'licensed operation' see PARA 176 note 11.

5 Deep Sea Mining (Temporary Provisions) Act 1981 s 6(1)(a)(i). As to the meaning of 'ancillary operations' see PARA 176 note 12.

6 Deep Sea Mining (Temporary Provisions) Act 1981 s 6(1)(a)(ii).

7 Deep Sea Mining (Temporary Provisions) Act 1981 s 6(1)(a)(iii). As to foreign discriminatory action see PARA 181.

8 Deep Sea Mining (Temporary Provisions) Act 1981 s 6(1)(a)(iv). As to the meaning of 'United Kingdom' see PARA 30 note 3.

9 Deep Sea Mining (Temporary Provisions) Act 1981 s 6(1)(b). As to the meaning of 'licensee' see PARA 176 note 13.

10 Deep Sea Mining (Temporary Provisions) Act 1981 s 6(2).

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### **181. Foreign discriminatory action.**

Where any ship<sup>1</sup> which is registered in a country of which the government<sup>2</sup>, in the opinion of the Secretary of State, has adopted or is proposing to adopt discriminatory measures or practices prohibiting or otherwise restricting the use, in connection with any deep sea bed mining operations<sup>3</sup>, of ships registered in the United Kingdom<sup>4</sup>, the Secretary of State may include in any exploration<sup>5</sup> or exploitation licence<sup>6</sup>, either on granting the licence or by a subsequent variation, such terms and conditions as he considers expedient for prohibiting or otherwise restricting the use in connection with the licensed operations<sup>7</sup> or any ancillary operations<sup>8</sup> of any ship<sup>9</sup>.

1 'Ship' includes every description of vessel used in navigation: Deep Sea Mining (Temporary Provisions) Act 1981 s 17.

2 Or an agency or authority of the government: Deep Sea Mining (Temporary Provisions) Act 1981 s 8(1). In s 8, references to an agency or authority of a government include references to any undertaking appearing to the Secretary of State to be, or to be acting on behalf of, an undertaking which is in effect owned or controlled (directly or indirectly) by a state other than the United Kingdom: s 8(4). As to the Secretary of State see PARA 29. As to the meaning of 'United Kingdom' see PARA 30 note 3.

3 As to the meaning of 'deep sea bed mining operations' see PARA 176 note 7.

4 Deep Sea Mining (Temporary Provisions) Act 1981 s 8(1). The Secretary of State may by order extend s 8 to ships which are registered in any country of which the government (or any agency or authority of the government), in his opinion, has adopted or is proposing to adopt discriminatory measures or practices prohibiting or otherwise restricting the use in connection with any deep sea bed mining operations of ships registered in the Channel Islands, the Isle of Man or any colony.

5 As to the meaning of 'exploration licence' see PARA 176 note 3.

6 As to the meaning of 'exploitation licence' see PARA 176 note 4.

7 As to the meaning of 'licensed operation' see PARA 176 note 11.

8 As to the meaning of 'ancillary operations' see PARA 176 note 12.

9 Deep Sea Mining (Temporary Provisions) Act 1981 s 8(2). This provision does not prejudice the Secretary of State's ability to include the terms and conditions listed under s 2(3): s 8(2).

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## **182. The deep sea mining levy.**

The holder of an exploitation licence<sup>1</sup> must, at the prescribed<sup>2</sup> times, pay to the Secretary of State<sup>3</sup>: (1) an amount equal to 3.75 per cent of the value of the hard mineral resources<sup>4</sup> recovered in pursuance of the licence during any prescribed period; or (2) if the value of the hard mineral resources so recovered cannot be ascertained under head (1) above, 0.75 per cent of the value of any manganese, nickel, cobalt, copper, phosphorus or molybdenum<sup>5</sup>, or any compound containing any of the elements, found in those hard mineral resources<sup>6</sup>. If any hard mineral resources recovered by the licensee during any prescribed period contain less than the amount<sup>7</sup> prescribed in relation to that period of any of the elements or any compound containing any of the elements, the licensee is not liable to make any payment in respect of that element or compound<sup>8</sup>. A licensee may elect, in writing and at the prescribed times, in respect of any element or compound specified in the election to defer payment until the element or compound is separated from any other matter with which it was recovered or, if earlier, until he disposes of the hard mineral resources containing that element or compound<sup>9</sup>.

1 As to the meaning of 'exploitation licence' see PARA 176 note 4.

2 As to the meaning of 'prescribed' see PARA 176 note 2.

3 As to the Secretary of State see PARA 29.

4 As to the meaning of 'hard mineral resources' see PARA 175 note 4.

5 These are known collectively as 'the elements': Deep Sea Mining (Temporary Provisions) Act 1981 s 9(1).

6 Deep Sea Mining (Temporary Provisions) Act 1981 s 9(1). The value of any hard mineral resources, element or compound is, for the purposes of s 9(1), determined in accordance with such rules as may be prescribed: s 9(2). Where a licensee fails at the prescribed time to pay to the Secretary of State any amount which he is required by s 9(1) to pay at that time, the amount will, as from that time, carry interest at the relevant rate until payment: s 9(5).

As to the meaning of 'licensee' see PARA 176 note 13. For the purposes of s 9, 'relevant rate' means such rate as the Secretary of State may with the consent of the Treasury prescribe: s 9(5). As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

7 ie by weight or proportion or otherwise: Deep Sea Mining (Temporary Provisions) Act 1981 s 9(3).

8 Deep Sea Mining (Temporary Provisions) Act 1981 s 9(3).

9 Deep Sea Mining (Temporary Provisions) Act 1981 s 9(4). Where any payment has been deferred under s 9(4) and becomes due, the amount due is to be calculated in accordance with s 9(1)-(3), and, for the purposes of s 9(5), that amount is to be deemed to have become due on the date when it would have been due had the election not been made: s 9(6).

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### **183. The deep sea mining fund.**

A fund is to be established under the control and management of the Treasury<sup>1</sup> called the Deep Sea Mining Fund, into which any sums paid to the Secretary of State<sup>2</sup> under the Deep Sea Mining (Temporary Provisions) Act 1981<sup>3</sup> are to be paid<sup>4</sup>. The Treasury must prepare accounts of the fund<sup>5</sup>. If an international organisation for the deep sea bed<sup>6</sup> is established in pursuance of an international agreement on the law of the sea which has been adopted by a United Nations Conference on the Law of the Sea and has entered into force for the United Kingdom, the Secretary of State may by order designate that organisation as the relevant international organisation for the purposes of this provision<sup>7</sup>.

1 As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

2 As to the Secretary of State see PARA 29.

3 Ie under the Deep Sea Mining (Temporary Provisions) Act 1981 s 9: see PARA 182.

4 Deep Sea Mining (Temporary Provisions) Act 1981 s 10(1).

5 Deep Sea Mining (Temporary Provisions) Act 1981 s 10(2). The Treasury must send the accounts to the Comptroller and Auditor General not later than the end of the month of November following the financial year to which the accounts relate; and the Comptroller and Auditor General must examine and certify every such account and must lay copies of the accounts, together with his report on them, before Parliament: s 10(2). This provision will not have effect until the first payment into the fund is made: s 10(3). As to the Comptroller and Auditor General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 724 et seq.

For these purposes, 'financial year' means a period of 12 months ending on 31 March except that the Secretary of State may direct that: (1) the first financial year for the fund is to be of such period not exceeding two years and ending on 31 March as he may specify in the direction; and (2) where an order under s 10(7) is made (see note 7), the last financial year will be of such period not exceeding 12 months as he may specify in the direction; and, where a direction is given under head (1) above, s 10(2) will apply in relation to the accounts for that last financial year with the substitution for the reference to the end of the month of November of a reference to the end of the eighth month following the end of that year: s 10(4).

6 As to the International Seabed Authority see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 12. As to the meaning of 'deep sea bed' see PARA 175 note 3.

7 Deep Sea Mining (Temporary Provisions) Act 1981 s 10(5). An order designating an international organisation as the relevant international organisation for the purposes of s 10 may also make provision for the payment to that organisation of any sums for the time being standing to the credit of the fund: s 10(6). At the date at which this volume states the law, no such order had been made.

If within ten years of the coming into force of s 10 no organisation has been designated as the relevant international organisation, the Secretary of State may by order made with the approval of the Treasury provide for the winding up of the Fund and the payment into the Consolidated Fund of any sums standing to its credit, and for the repeal of s 9: s 10(7). At the date at which this volume states the law no such order had been made.

Until such time as an international organisation is so designated, any money in the Fund may from time to time be paid over to the National Debt Commissioners and invested by them, in accordance with such directions as may be given by the Treasury, in any such manner as may be specified by an order of the Treasury for the time being in force under the National Savings Bank Act 1971 s 22(1) (repealed): Deep Sea Mining (Temporary Provisions) Act 1981 s 10(9). As to investment deposits with the National Savings Bank see the Finance Act 1980 s 120; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 812.

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#### **184. Inspectors.**

The Secretary of State<sup>1</sup> may appoint as inspectors to discharge such functions as may be prescribed<sup>2</sup> and generally to assist him in the execution of the Deep Sea Mining (Temporary Provisions) Act 1981 such persons appearing to him to be qualified for the purpose as he considers appropriate from time to time<sup>3</sup>.

1 As to the Secretary of State see PARA 29.

2 As to the meaning of 'prescribed' see PARA 176 note 2.

3 Deep Sea Mining (Temporary Provisions) Act 1981 s 11(1). The Secretary of State may make to or in respect of any inspector appointed under s 11(1) such payments by way of remuneration or otherwise as the Secretary of State may determine with the approval of the Minister for the Civil Service: s 11(2). As to the Minister for the Civil Service see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 427, 550.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(v) The Deep Sea Bed/185. Regulations and orders.

**185. Regulations and orders.**

The Secretary of State<sup>1</sup> may make regulations prescribing anything required or authorised to be prescribed under the Deep Sea Mining (Temporary Provisions) Act 1981 and generally for carrying the Act into effect<sup>2</sup>.

1 As to the Secretary of State see PARA 29.

2 Deep Sea Mining (Temporary Provisions) Act 1981 s 12(1). Regulations under s 12(1) may make different provision for different cases or classes of cases and may exclude the operation of any provision of the regulations in specified cases; and must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 12(2). Without prejudice to the generality of the foregoing, regulations may be made with respect to any of the matters mentioned in the Schedule: s 12(1).

Any power of the Secretary of State to make an order under the Deep Sea Mining (Temporary Provisions) Act 1981 is to be exercisable by statutory instrument: s 12(3). The following orders have been made under s 12: the Deep Sea Mining (Exploration Licences) (Applications) Regulations 1982, SI 1982/58; and the Deep Sea Mining (Exploration Licences) Regulations 1984, SI 1984/1230.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(v) The Deep Sea Bed/186. Disclosure of information.

### 186. Disclosure of information.

A person must not disclose any information which he has received in pursuance of the Deep Sea Mining (Temporary Provisions) Act 1981 and which relates to any other person except: (1) with the written consent of that other person<sup>1</sup>; or (2) to the Treasury, the Commissioners of Customs and Excise or the Secretary of State<sup>2</sup>; or (3) with a view to the institution of or otherwise for the purposes of any criminal proceedings under this Act or regulations made under this Act<sup>3</sup>; or (4) in accordance with regulations made under this Act<sup>4</sup>; or (5) to the government of a reciprocating country or an agency of such a government or to any international organisation designated as the relevant international organisation for the purposes of the Deep Sea Fund Mining Fund<sup>5</sup>. Any person who discloses any information in contravention this provision is to be guilty of an offence<sup>6</sup>.

1 Deep Sea Mining (Temporary Provisions) Act 1981 s 13(1)(a).

2 Deep Sea Mining (Temporary Provisions) Act 1981 s 13(1)(b). As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517. As to the Commissioners of Customs and Excise see **CUSTOMS AND EXCISE** vol 12(2) (2007 Reissue) PARA 905 et seq. As to the Secretary of State see PARA 29.

3 Deep Sea Mining (Temporary Provisions) Act 1981 s 13(1)(c).

4 Deep Sea Mining (Temporary Provisions) Act 1981 s 13(1)(d).

5 Deep Sea Mining (Temporary Provisions) Act 1981 s 13(1)(e). As to the Deep Sea Mining Fund see PARA 183.

6 Deep Sea Mining (Temporary Provisions) Act 1981 s 13(2). Any person guilty of such an offence is liable, on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both (s 13(2)(a)) or, on summary conviction, to a fine not exceeding the statutory maximum (s 13(2)(b)). As to the statutory maximum see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140. As to the supplementary provisions relating to offences under the Deep Sea Mining (Temporary Provisions) Act 1981 see PARA 187.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(v) The Deep Sea Bed/187. Supplementary provisions relating to offences.

### **187. Supplementary provisions relating to offences.**

Proceedings for an offence under the Deep Sea Mining (Temporary Provisions) Act 1981 or under regulations made under the Act may be taken, and the offence may for incidental purposes be treated as having been committed, in any place in the United Kingdom<sup>1</sup>. A person may be guilty of an offence under regulations made under the Deep Sea Mining (Temporary Provisions) Act 1981 whether or not he is a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen or, in the case of a body corporate, it is incorporated under the law of any part of the United Kingdom<sup>2</sup>. Where an offence has been committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director<sup>3</sup>, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and is liable to be proceeded against and punished accordingly<sup>4</sup>. In any proceedings for an offence of failing to comply with any provision of the Deep Sea Mining (Temporary Provisions) Act 1981 or of regulations made under the Act, it is a defence to prove that the accused used all due diligence to comply with that provision<sup>5</sup>.

1 Deep Sea Mining (Temporary Provisions) Act 1981 s 14(1). Proceedings for such an offence are not to be instituted in England and Wales or Northern Ireland except: (1) in the case of proceedings in England and Wales, by or with the consent of the Director of Public Prosecutions; or (2) in the case of proceedings in Northern Ireland, by or with the consent of the Director of Public Prosecutions for Northern Ireland; or (3) in any case, by the Secretary of State or a person authorised by him in that behalf: s 14(2). As to the meaning of 'United Kingdom' see PARA 30 note 3. As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq. As to the Secretary of State see PARA 29.

2 Deep Sea Mining (Temporary Provisions) Act 1981 s 14(3) (amended by the British Overseas Territories Act 2002 s 2(3); and SI 1986/948).

3 For these purposes, 'director', in relation to a body corporate which (1) is established by or under any enactment for the purpose of carrying on under public ownership any industry or part of an industry or undertaking; and (2) is a body whose affairs are managed by its members, means a member of the body corporate: Deep Sea Mining (Temporary Provisions) Act 1981 s 14(4).

4 Deep Sea Mining (Temporary Provisions) Act 1981 s 14(4).

5 Deep Sea Mining (Temporary Provisions) Act 1981 s 14(5).

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**188. Civil liability for breach of statutory duty.**

Breach of a duty imposed on any person by a provision of certain regulations made in pursuance of the Deep Sea Mining (Temporary Provisions) Act 1981<sup>1</sup> is actionable so far, and only so far, as the breach causes personal injury<sup>2</sup>. A defence to a charge which is available by virtue of the supplementary provisions relating to offences under the Deep Sea Mining (Temporary Provisions) Act 1981<sup>3</sup> or by virtue of regulations made under that Act is not a defence in any civil proceedings<sup>4</sup>.

1 The regulations which state that the Deep Sea Mining (Temporary Provisions) Act 1981 s 15(1) applies to such a breach: see s 15(1).

2 Deep Sea Mining (Temporary Provisions) Act 1981 s 15(1). References in the Fatal Accidents Act 1976 s 1 to a wrongful act, neglect or default, include references to any such breach which is so actionable: Deep Sea Mining (Temporary Provisions) Act 1981 s 15(1). As to the Fatal Accidents Act 1976 see **NEGLIGENCE** vol 78 (2010) PARA 25 et seq. 'Personal injury' includes any disease, any impairment of a person's physical or mental condition and any fatal injury: s 15(4). Nothing in s 15(1) is to prejudice any action which lies apart from these provisions: s 15(2).

3 The Deep Sea Mining (Temporary Provisions) Act 1981 s 14(5): see PARA 187.

4 Deep Sea Mining (Temporary Provisions) Act 1981 s 15(3).

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**189. Disapplication of Part II of the Food and Environment Protection Act 1985.**

Nothing in Part II of the Food and Environment Protection Act 1985<sup>1</sup> applies in relation to anything done in pursuance of an exploration<sup>2</sup> or exploitation<sup>3</sup> licence or a reciprocal authorisation<sup>4</sup>.

1     le the Food and Environment Protection Act 1985 Pt II (ss 5-15): see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 525.

2     As to the meaning of 'exploration licence' see PARA 176 note 3.

3     As to the meaning of 'exploitation licence' see PARA 176 note 4.

4     Deep Sea Mining (Temporary Provisions) Act 1981 s 16 (amended by the Food and Environment Act 1985 s 15). As to the meaning of 'reciprocal authorisation' see PARA 177 note 6.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/8. LAW OF THE SEA/(2) THE HIGH SEAS/(vi) Conservation and Management of the Living Resources of the High Seas/190. Right to fish on the high seas.

## **(vi) Conservation and Management of the Living Resources of the High Seas**

### **190. Right to fish on the high seas.**

All states have the right for their nationals to engage in fishing on the high seas<sup>1</sup>, subject to<sup>2</sup>: (1) their treaty obligations<sup>3</sup>; (2) the rights and duties, as well as the interests, of coastal states provided for in provisions respecting the exclusive economic zone<sup>4</sup>; and (3) the provisions of the United Nations Convention on the Law of the Sea relating to the conservation and management of the living resources of the high seas<sup>5</sup>.

1 As to the freedom of the 'high seas' see PARA 147 et seq.

2 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, TS 81 (1999); Cmnd 4524) art 116.

3 United Nations Convention on the Law of the Sea art 116(a). As to multilateral and bilateral treaties to which the United Kingdom is a party see PARA 192 et seq.

4 United Nations Convention on the Law of the Sea art 116(b). The provisions referred to in the text are, inter alia, arts 63 para 2, 64-67; see PARA 154. As to the exclusive economic zone see PARA 154.

5 United Nations Convention on the Law of the Sea art 116(c). The provisions referred to in the text are contained in Pt VII s 2 (arts 116-120).

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### **191. Duties of states.**

All states have the duty to take, or to co-operate with other states in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas<sup>1</sup>. States must co-operate in the conservation and management of such resources<sup>2</sup>. In determining the allowable catch and establishing other conservation measures, states are to take measures which are designed, on the best scientific evidence available, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield as qualified by relevant environmental and economic factors<sup>3</sup>, and take into consideration the effects on species associated with or dependent upon the harvested species<sup>4</sup>. States must also ensure that conservation measures and their implementation do not discriminate in form or fact against the fishermen of any state<sup>5</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; Misc 11 (1983) Cmnd 8941) art 117.

2 United Nations Convention on the Law of the Sea art 118.

3 United Nations Convention on the Law of the Sea art 119 para 1(a). As to the exchange of available scientific information, relevant statistics and other data see art 119 para 2.

4 United Nations Convention on the Law of the Sea art 119 para 1(b).

5 United Nations Convention on the Law of the Sea art 119 para 3.

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## **192. International fisheries agreements.**

As a matter of European Union law, the United Kingdom has transferred competence to the European Union (EU) with regard to the conservation and management of living marine resources. Hence, in this field, it is for the EU to adopt the relevant rules and regulations (which the United Kingdom and other member states enforce), and it is within the competence of the EU to enter into external undertakings with third states or competent organisations<sup>1</sup>. With regard to fisheries, for a certain number of matters that are not directly related to the conservation and management of sea fishing resources, for example research and technological development and development cooperation, competence is shared between the EU and its member states<sup>2</sup>. Although the European Union is more active in relation to fisheries<sup>3</sup>, the United Kingdom remains a party to certain international agreements concerning the living resources of the seas, such as the International Convention for the Regulation of Whaling<sup>4</sup>.

1 See the Declaration concerning the Competence of the European Community with regard to matters Governed by the United Nations Convention on the Law of the Sea of 10 December and the Agreement of 28 July 1994 relating to the Implementation of Part XI of the Convention (Declaration made pursuant to article 5(1) of Annex IX to the Convention and to article 4(4) of the Agreement); and the Declarations concerning the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

2 See the Declaration concerning the Competence of the European Community with regard to matters Governed by the United Nations Convention on the Law of the Sea of 10 December and the Agreement of 28 July 1994 relating to the Implementation of Part XI of the Convention (Declaration made pursuant to article 5(1) of Annex IX to the Convention and to article 4(4) of the Agreement); and the Declarations concerning the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

3 See eg the North East Atlantic Fisheries Commission established under Council Decision 81/608 (OJ L227, 12/08/1981, p 22) concerning the conclusion of the Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries (see art 3(1)) and Council Decision 2009/550 (OJ L184, 16.7.2009, p 12-15) on the approval of amendments to the Convention on future multilateral cooperation in the North-East Atlantic Fisheries allowing for the establishment of dispute settlement procedures, the extension of the scope of the Convention and a review of the objectives of the Convention.

4 I.e. the International Convention for the Regulation of Whaling (Washington, 2 December 1946; TS 5 (1949); Cmd 7604). This Convention, which replaces earlier agreements, has frequently been amended. As to whaling see **AGRICULTURE AND FISHERIES**.

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### **193. Protection and preservation of the marine environment.**

The United Nations Convention on the Law of the Sea<sup>1</sup> makes provision for the protection and preservation of the marine environment<sup>2</sup>. States are obliged to protect and preserve the marine environment<sup>3</sup>. They have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect the marine environment<sup>4</sup>. States must take, individually or jointly as appropriate, all measures to prevent, reduce and control pollution of the marine environment<sup>5</sup>. They must so act as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another<sup>6</sup>, and must take all measures necessary to prevent, reduce and control pollution from the use of technologies or the introduction of alien or new species to a part of the marine environment which may cause significant and harmful changes thereto<sup>7</sup>. Provision is made for global and regional co-operation<sup>8</sup>, technical assistance and preferential treatment for developing states<sup>9</sup> and monitoring and environmental assessment<sup>10</sup>. States are under the duty to establish international rules and national legislation to prevent, reduce and control pollution of the marine environment<sup>11</sup>. These must cover pollution: (1) from land based sources<sup>12</sup>; (2) from sea bed activities subject to national jurisdiction<sup>13</sup>; (3) from activities in the Area<sup>14</sup>; (4) by dumping<sup>15</sup>; (5) from vessels<sup>16</sup>; and (6) from or through the atmosphere<sup>17</sup>. Provision is also made for the enforcement of laws and regulations<sup>18</sup>. In particular, flag states must ensure compliance<sup>19</sup> and port states and coastal states may also do so<sup>20</sup>. There are provisions concerned with ice-covered areas<sup>21</sup>, state responsibility and liability<sup>22</sup> and sovereign immunity<sup>23</sup>.

These provisions<sup>24</sup> are without prejudice to the specific obligations assumed by states under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in the United Nations Convention on the Law of the Sea<sup>25</sup>.

1 The United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524).

2 See the United Nations Convention on the Law of the Sea Pt XII (arts 192-237).

3 United Nations Convention on the Law of the Sea art 192.

4 United Nations Convention on the Law of the Sea art 193.

5 United Nations Convention on the Law of the Sea art 194.

6 United Nations Convention on the Law of the Sea art 195.

7 United Nations Convention on the Law of the Sea art 196.

8 United Nations Convention on the Law of the Sea Pt XII Section 2 (arts 197-201).

9 United Nations Convention on the Law of the Sea Pt XII Section 3 (arts 202-203).

10 United Nations Convention on the Law of the Sea Pt XII Section 4 (arts 204-206).

11 United Nations Convention on the Law of the Sea Pt XII Section 5 (arts 207-212).

12 United Nations Convention on the Law of the Sea art 207.



- 13 United Nations Convention on the Law of the Sea art 208.
- 14 United Nations Convention on the Law of the Sea art 209. As to 'the Area' see PARA 173.
- 15 United Nations Convention on the Law of the Sea art 210.
- 16 United Nations Convention on the Law of the Sea art 211.
- 17 United Nations Convention on the Law of the Sea art 212.
- 18 United Nations Convention on the Law of the Sea Pt XII Section 6 (arts 213-222).
- 19 United Nations Convention on the Law of the Sea art 217.
- 20 United Nations Convention on the Law of the Sea arts 218, 220. As to measures by port states regarding the seaworthiness of vessels see art 219. As to measures to avoid pollution from maritime casualties see art 221. Provision is made for safeguards where the port or coastal state takes enforcement action under arts 218-220: see Pt XII Section 7 (arts 223-233).
- 21 United Nations Convention on the Law of the Sea art 234.
- 22 United Nations Convention on the Law of the Sea art 235.
- 23 United Nations Convention on the Law of the Sea art 236.
- 24 Ie the provisions contained in the United Nations Convention on the Law of the Sea Pt XII: see the text and notes 1-23.
- 25 United Nations Convention on the Law of the Sea art 237 para 1. Many international agreements relating to the protection and preservation of the marine environment have been concluded; and many of them are frequently updated. Among the more important of the agreements to which the United Kingdom is a party are the following: Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Brussels, 29 November 1969; TS 77 (1975); Cmnd 6056); the International Convention for the Prevention of Pollution from Ships (MARPOL) (London, 2 November 1973), as amended by the Protocol (London, 1 June 1978) (1340 UNTS 61), and the Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992 (Paris, 22 September 1992; TS 14 (1999); Cm 4278). For further provisions relating to the prevention of pollution from ships see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 347 et seq.

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#### **194. Marine scientific research.**

The United Nations Convention on the Law of the Sea<sup>1</sup> makes provision for the conduct of marine scientific research<sup>2</sup>. All states, irrespective of their geographical location, and competent international organisations, have the right to conduct such research<sup>3</sup> and to promote and facilitate its development and conduct<sup>4</sup>, which must be carried out exclusively for peaceful purposes<sup>5</sup>. Marine research activities may not constitute the legal basis for any claims to any part of the marine environment or its resources<sup>6</sup>. States and competent international organisations are to promote international co-operation in marine scientific research<sup>7</sup>, create favourable conditions<sup>8</sup> and publish and disseminate information and knowledge<sup>9</sup>. Marine scientific research in the territorial sea<sup>10</sup>, in the exclusive economic zone and on the continental shelf is subject to the consent of the coastal state<sup>11</sup>. States must endeavour to adopt reasonable rules, regulations and procedures to promote and facilitate marine scientific research conducted in accordance with the Convention<sup>12</sup>. All states and competent international organisations have the right to conduct research on the deep sea bed<sup>13</sup> and in the water<sup>14</sup> column beyond the exclusive economic zone<sup>15</sup>. Provision is made regarding scientific research installations or equipment and their status<sup>16</sup>, for the responsibility and liability of states and competent international organisations<sup>17</sup> and for the settlement of disputes<sup>18</sup>. The Convention also provides for the development and transfer of marine technology<sup>19</sup>.

1    le the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524).

2    See United Nations Convention on the Law of the Sea Pt XIII (arts 238-265). As to the freedom to conduct scientific research and the high seas see PARA 147.

3    United Nations Convention on the Law of the Sea art 238.

4    United Nations Convention on the Law of the Sea art 239.

5    United Nations Convention on the Law of the Sea art 240(a). For the other general principles for the conduct of marine scientific research see art 240(b)-(d).

6    United Nations Convention on the Law of the Sea art 241.

7    United Nations Convention on the Law of the Sea art 242 para 1.

8    United Nations Convention on the Law of the Sea art 243.

9    United Nations Convention on the Law of the Sea art 244.

10   United Nations Convention on the Law of the Sea art 245. As to the territorial sea see PARA 123 et seq.

11   United Nations Convention on the Law of the Sea art 246. As to the exclusive economic zone see PARA 154. As to the continental shelf see PARA 163 et seq. States and competent international organisations which intend to undertake marine scientific research in the exclusive economic zone or on the continental shelf are bound to provide information to the coastal state: art 248. They also have the duty to comply with certain conditions: art 249. Communications concerning the marine scientific projects must be made through official channels, unless otherwise agreed: art 250. Under certain circumstances a coastal state has the right to require the suspension of any marine scientific research activities in progress: art 253. Neighbouring land-locked and geographically disadvantaged states are given the opportunity to participate in proposed marine scientific research: art 254.

12   United Nations Convention on the Law of the Sea art 255.

- 13 United Nations Convention on the Law of the Sea art 256. As to the deep sea bed see PARA 173.
- 14 le in the waters of the high seas.
- 15 United Nations Convention on the Law of the Sea art 257.
- 16 United Nations Convention on the Law of the Sea Pt XIII Section 4 (arts 258-262).
- 17 United Nations Convention on the Law of the Sea art 263.
- 18 United Nations Convention on the Law of the Sea Pt XIII Section 6 (arts 264, 265). As to settlement of disputes see PARA 514.
- 19 United Nations Convention on the Law of the Sea Pt XIV (arts 266-278).

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### **(3) DRUG TRAFFICKING**

#### **195. Narcotic drugs and psychotropic substances.**

States must co-operate in the suppression of the illicit traffic in narcotic drugs and psychotropic substances by ships on the high seas contrary to international conventions<sup>1</sup>. A state which reasonably believes that a ship flying its flag is engaged in such illicit traffic may request the co-operation of other states to suppress it<sup>2</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 108 para 1. The Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988; Misc 14 (1989); Cm 804) art 17 deals with the illicit traffic in drugs by sea and confers powers to board, search and inspect ships by states other than the flag state.

2 United Nations Convention on the Law of the Sea art 108 para 2.

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#### **(4) BROADCASTING**

##### **196. Broadcasting at sea; pirate radio.**

States must co-operate in the suppression of unauthorised broadcasting from the high seas<sup>1</sup>. A person engaged in unauthorised broadcasting may be prosecuted before the courts of: (1) the flag state; (2) the state of registry of the installation; (3) the state of which the person is a national; (4) any state where the transmissions can be received; or (5) any state where authorised radio communication is suffering interference<sup>2</sup>. On the high seas, any such state may arrest any person or ship engaged in unauthorised broadcasting and seize the broadcasting apparatus<sup>3</sup>.

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 109 para 1. For the purposes of the Convention, 'unauthorised broadcasting' means the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls: art 109 para 2. As to the high seas see PARA 147 et seq. As to the domestic legislation see **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 582.

2 United Nations Convention on the Law of the Sea art 109 para 3.

3 United Nations Convention on the Law of the Sea art 109 para 4. An arrest or seizure must be in conformity with art 110: art 109 para 4; and see PARA 148.

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## **9. AIR SPACE, OUTER SPACE, AND ANTARCTICA**

### **(1) AIR SPACE**

#### **(i) In general**

##### **197. Sovereignty in air space.**

The sovereignty of a state extends to the air space above its land territory and its territorial sea<sup>1</sup>. Thus, in the absence of a treaty limiting its sovereignty in this regard, a state is free to permit or to forbid the flight of foreign aircraft through its air space<sup>2</sup>.

1 This principle is part of customary international law and is recognised in major international conventions, notably the International Convention for the Regulation of Aerial Navigation (Paris, 13 October 1919; TS (1922); Cmd 1609), which was superseded by the Convention on International Civil Aviation (Chicago Convention) (Chicago, 7 December 1944; TS 8 (1953); Cmd 8742), to which the United Kingdom is a party and which recognises that every state has complete and exclusive sovereignty over the air space above its territory (art 1), which is deemed to be the land areas and territorial waters adjacent to it under the sovereignty, suzerainty, protection or mandate of the state (art 2). The United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmd 4524) also provides that the sovereignty of a coastal state extends to the air space over the territorial sea (art 2(2)). As to the Chicago Convention see **AIR LAW** vol 2 (2008) PARA 2 et seq. There is no definition in international law of the upper limit of air space, and there is no right of innocent passage through the air space above the territorial sea akin to that through the territorial sea itself. As to the territorial sea see PARA 123 et seq. As to innocent passage see PARA 133. As for transit passage through straits used for international navigation see PARA 143.

2 The leading treaty which restricts the exercise of these sovereign rights is the Chicago Convention: see **AIR LAW** vol 2 (2008) PARA 2 et seq.

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# **198. Jurisdiction in international law over offences on aircraft.**

Jurisdiction in international law over offences against aircraft is exercised on general principles<sup>1</sup>. The state of registration of the aircraft and the state of the nationality of the offender thus have jurisdiction. The United Kingdom is a party to three international conventions dealing with offences on or against aircraft, namely the Tokyo Convention<sup>2</sup>, the Hague Convention<sup>3</sup> and the Montreal Convention<sup>4</sup>.

1 See PARA 219 et seq.

2 Ie the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) (Tokyo, 14 September 1963; TS 126 (1969); Cmnd 4230), which entered into force on 4 December 1969. See PARA 199 et seq; and **AIR LAW** vol 2 (2008) PARA 13.

3 Ie the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (The Hague, 16 December 1970; TS 39 (1972); Cmnd 4956), which entered into force on 14 October 1971. See PARAS 783-784; and **AIR LAW** vol 2 (2008) PARA 14.

4 Ie the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) (Montreal, 23 September 1971; TS 10 (1974); Cmnd 5524), which entered into force generally on 24 January 1973 and as respects the United Kingdom on 24 November 1974. See PARAS 205-206; and **AIR LAW** vol 2 (2008) PARA 15.

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## **(ii) The Tokyo Convention**

### **199. Application of the Tokyo Convention.**

The Tokyo Convention<sup>1</sup> applies in respect of offences against penal law and acts which, whether or not they are offences, may jeopardise the safety of aircraft or persons or property in them or which jeopardise good order and discipline on board<sup>2</sup>. The Convention applies in respect of any offences committed or acts done by a person on board any aircraft registered in a contracting state while the aircraft is in flight, or on the surface of the high seas or of any other area outside the territory of any state<sup>3</sup>. It does not apply to aircraft used in military, customs or police services<sup>4</sup>.

1 The Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) (Tokyo, 14 September 1963; TS 126 (1969); Cmnd 4230).

2 Convention on Offences and Certain Other Acts Committed on Board Aircraft art 1 para 1. For the law enacted in the United Kingdom see the Civil Aviation Act 1982; and **AIR LAW** vol 2 (2008) PARA 13.

3 Convention on Offences and Certain Other Acts Committed on Board Aircraft art 1 para 2. This is subject to exceptions in Ch III (arts 5-10) relating to powers of the aircraft commander. An aircraft is considered to be 'in flight' from the moment when power is applied for the purpose of take-off until the moment when the landing run ends: art 1 para 3. Cf PARA 203.

4 Convention on Offences and Certain Other Acts Committed on Board Aircraft art 1 para 4.



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## **200. Jurisdiction over offenders.**

The state of registration is competent to exercise jurisdiction over offences and acts committed on board the aircraft<sup>1</sup>. Each contracting state must take such measures as may be necessary to establish its jurisdiction as the state of registration over offences committed on board<sup>2</sup>. Criminal jurisdiction exercised over an offender in accordance with national law is specifically not excluded<sup>3</sup>.

1 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) (Tokyo, 14 September 1963; TS 126 (1969); Cmnd 4230) art 3 para 1. Offences committed on board an aircraft registered in a contracting state are to be treated for purposes of extradition as if they had been committed not only in the place where they have occurred but also in the territory of the state of registration: art 16 para 1. As to the jurisdiction over offenders under the Hague Convention see PARA 204. As to the jurisdiction over offenders under the Montreal Convention see PARA 206.

2 Convention on Offences and Certain Other Acts Committed on Board Aircraft art 3 para 2.

3 Convention on Offences and Certain Other Acts Committed on Board Aircraft art 3 para 3.

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## **201. Interference with aircraft in flight.**

A state which is not the state of registration may not interfere with an aircraft in flight<sup>1</sup> in order to exercise its criminal jurisdiction over an offence committed on board<sup>2</sup> except where: (1) the offence has its effect on the territory of such state<sup>3</sup>; (2) it has been committed by or against a national or permanent resident of such state<sup>4</sup>; (3) the offence is against the security of such state<sup>5</sup>; (4) it consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such state<sup>6</sup>; and (5) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such state under a multilateral international agreement<sup>7</sup>.

1 As to the meaning of 'in flight' see PARA 199 note 3.

2 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) (Tokyo, 14 September 1963; TS 126 (1969); Cmd 4230) art 4. In taking any measures for investigation or arrest or in otherwise exercising jurisdiction in connection with any offence, states must pay due regard to the safety and other interests of air navigation and so act as to avoid unnecessary delay of the aircraft passengers, crew or cargo: art 17.

3 Convention on Offences and Certain Other Acts Committed on Board Aircraft art 4(a).

4 Convention on Offences and Certain Other Acts Committed on Board Aircraft art 4(b).

5 Convention on Offences and Certain Other Acts Committed on Board Aircraft art 4(c).

6 Convention on Offences and Certain Other Acts Committed on Board Aircraft art 4(d).

7 Convention on Offences and Certain Other Acts Committed on Board Aircraft art 4(e).

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## **202. Restoration of aircraft.**

When a person on board has unlawfully committed by force or threat of force an act, seizure or other wrongful exercise of control of an aircraft in flight<sup>1</sup>, or where such act is about to be committed, states must take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of it<sup>2</sup>. In such cases the passengers and crew must be permitted to continue their journey as soon as practicable and the aircraft and cargo must be returned to the persons lawfully entitled to possession<sup>3</sup>.

1 As to the meaning of 'in flight' see PARA 199 note 3.

2 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) (Tokyo, 14 September 1963; TS 126 (1969); Cmnd 4230) art 11 para 1.

3 Convention on Offences and Certain Other Acts Committed on Board Aircraft art 11 para 2. As to the restoration of aircraft see PARAS 204 note 10, 206.

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### **(iii) The Hague Convention**

#### **203. Application of the Hague Convention.**

The Hague Convention<sup>1</sup>, which is concerned with hijacking of aircraft, provides that any person who on board an aircraft in flight<sup>2</sup> unlawfully, by force, threat of force or any other form of intimidation, seizes or exercises control of that aircraft or attempts to do so, or is an accomplice of a person who performs or attempts to perform any such act, commits an offence<sup>3</sup>. The contracting states undertake to make the offence punishable by severe penalties<sup>4</sup>. It does not apply to aircraft used in military, customs or police services<sup>5</sup>.

1 The Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (The Hague, 16 December 1970; TS 39 (1972); Cmnd 4956). The Convention is implemented into the law of the United Kingdom by the Aviation Security Act 1982: see **AIR LAW** vol 2 (2008) PARA 14.

2 An aircraft is deemed to be 'in flight' at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; and, in case of a forced landing, the flight is deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board: Convention for the Suppression of Unlawful Seizure of Aircraft art 3 para 1. Cf PARA 205 note 2.

3 Convention for the Suppression of Unlawful Seizure of Aircraft art 1. The Convention only applies if the place of take-off or the place of actual landing of the aircraft is situated outside the territory of the state of registration, although it is immaterial whether the aircraft is engaged in an international or domestic flight: art 3 para 3 (but see art 3 para 4 for an exception). Articles 6-8, 10 (which concern criminal jurisdiction over the offender and extradition) apply whatever the place of actual landing, if the offender is found in the territory of a state other than the state of registration: art 3 para 5.

4 Convention for the Suppression of Unlawful Seizure of Aircraft art 2.

5 Convention for the Suppression of Unlawful Seizure of Aircraft art 3 para 2.

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#### 204. Jurisdiction over offenders.

A contracting state must take the measures necessary to establish its jurisdiction over the offence when: (1) it is committed on board an aircraft registered in that state<sup>1</sup>; (2) the aircraft lands on its territory with the alleged offender on board<sup>2</sup>; or (3) the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if none, his permanent residence in that state<sup>3</sup>; and (4) the offender is present in its territory and it does not extradite<sup>4</sup> him to one of the states mentioned in heads (1) to (3) above<sup>5</sup>. The state where he is present must take the offender into custody and make a preliminary inquiry<sup>6</sup>. It must inform the state of registration and of the offender's nationality and the state mentioned in head (3) above and any other interested state, and indicate whether it intends to exercise jurisdiction<sup>7</sup>. If it does not extradite the offender it must submit the case to its competent authorities for prosecution<sup>8</sup>. The Hague Convention provides for assistance in criminal proceedings<sup>9</sup> and for making reports to the International Civil Aviation Organisation<sup>10</sup>. Criminal jurisdiction exercised over an offender in accordance with national law is specifically not excluded<sup>11</sup>.

1 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (The Hague, 16 December 1970; TS 39 (1972); Cmnd 4956) art 4 para 1(a). As to the jurisdiction of the state of registration in cases of joint operating organisations or international agencies see art 5.

2 Convention for the Suppression of Unlawful Seizure of Aircraft art 4 para 1(b).

3 Convention for the Suppression of Unlawful Seizure of Aircraft art 4 para 1(c).

4 Convention for the Suppression of Unlawful Seizure of Aircraft art 8 creates an obligation to make hijacking an extraditable offence. As to extradition generally see **EXTRADITION**.

5 Convention for the Suppression of Unlawful Seizure of Aircraft art 4 para 2.

6 Convention for the Suppression of Unlawful Seizure of Aircraft art 6 paras 1, 2.

7 Convention for the Suppression of Unlawful Seizure of Aircraft art 6 para 4.

8 Convention for the Suppression of Unlawful Seizure of Aircraft art 7. This obligation is without any exception whatsoever and applies whether or not the offence was committed within its territory: art 7.

9 Convention for the Suppression of Unlawful Seizure of Aircraft art 10 para 1.

10 Convention for the Suppression of Unlawful Seizure of Aircraft art 11. The Convention contains provisions with respect to the restoration of aircraft: see art 9. As to the restoration of aircraft see **PARAS** 202 note 3, 206. As to the International Civil Aviation Organisation see **AIR LAW** vol 2 (2008) **PARA** 20 et seq.

11 Convention for the Suppression of Unlawful Seizure of Aircraft art 4 para 3.

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## **(iv) The Montreal Convention**

### **205. Application of the Montreal Convention.**

The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation<sup>1</sup> provides that a person commits an offence if he unlawfully and intentionally: (1) performs an act of violence against a person on board an aircraft in flight<sup>2</sup> if that act is likely to endanger its safety<sup>3</sup>; (2) destroys an aircraft in service or damages it so as to render it incapable of flight or so as to endanger its safety in flight<sup>4</sup>; (3) places, or causes to be placed, on such an aircraft any device or substance which is likely to destroy it or damage it<sup>5</sup>; (4) destroys or damages air navigation facilities or interferes with their operation so as to endanger the safety of an aircraft in flight<sup>6</sup>; (5) communicates information knowing it to be false, thereby endangering the safety of an aircraft in flight<sup>7</sup>; (6) using any device, substance, or weapon performs an act of violence against an airport serving international civil aviation which causes or is likely to cause serious injury or death, or destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport<sup>8</sup>. An offence is also committed by anyone who attempts to commit any of these offences or is an accomplice of a person who commits or attempts to commit such an offence<sup>9</sup>. The contracting states undertake to make these offences punishable by severe penalties<sup>10</sup>. The Convention does not apply to aircraft used in military, customs or police services<sup>11</sup>.

1 The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) (Montreal, 23 September 1971; TS 10 (1974); Cmnd 5524). The Convention is implemented into the law of the United Kingdom by the Aviation Security Act 1982: see **AIR LAW** vol 2 (2008) PARA 15.

2 An aircraft is deemed to be 'in flight' at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; and, in case of a forced landing, the flight is deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board: Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art 2(a). Cf PARA 203 note 3. Additionally, an aircraft is deemed to be in service from the beginning of the pre-flight preparation by ground personnel or by the crew for a specific flight until 24 hours after any landing; and the period of service in any event extends for the entire period during which the aircraft is in flight: art 2(b).

3 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art 1(a).

4 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art 1(b).

5 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art 1(c).

6 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art 1(d).

7 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art 1(e).

8 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art 1 para 1 (added by Protocol (Montreal, 24 February 1988; TS 20 (1991); Cm 1470)).

9 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art 1 para 2.

10 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art 3.

11 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art 4 para 1. For further restrictions see art 4 paras 2-6.

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## **206. Jurisdiction over offenders.**

The Montreal Convention<sup>1</sup> contains provisions similar, mutatis mutandis, to the Hague Convention<sup>2</sup> as regards jurisdiction over offenders, extradition, assistance in criminal proceedings and reports to the International Civil Aviation Organisation<sup>3</sup>. There is a similar obligation in regard to the restoration of aircraft<sup>4</sup>. The contracting states are under an obligation, in accordance with international and national law, to take all practicable measures for the purpose of preventing the offences created by the Montreal Convention<sup>5</sup>.

1 The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) (Montreal, 23 September 1971; TS 10 (1974); Cmnd 5524).

2 The Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (The Hague, 16 December 1970; TS 39 (1972); Cmnd 4956).

3 See the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation arts 5-9, 11-13. Cf the provisions set out in PARA 204.

4 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art 10 para 2. Cf PARA 204.

5 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art 10 para 1.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/9. AIR SPACE, OUTER SPACE, AND ANTARCTICA/(2) OUTER SPACE/207. International law in outer space.

## **(2) OUTER SPACE**

### **207. International law in outer space.**

The General Assembly of the United Nations has accepted the principle that international law, including the Charter of the United Nations<sup>1</sup>, applies to outer space and celestial bodies<sup>2</sup>. The United Kingdom is a party to the Outer Space Treaty<sup>3</sup>, to the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects launched into Outer Space<sup>4</sup>, the Convention on International Liability for Damage caused by Space Objects<sup>5</sup>, and the Convention on Registration of Objects launched into Outer Space<sup>6</sup>. There is also an Agreement governing Activities of States on the Moon and other Celestial Bodies<sup>7</sup>.

1 See the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015).

2 General Assembly Resolution 1721 (XVI) of 20 December 1961.

3 See the Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies (London, Moscow and Washington, 27 January 1967; TS 10 (1968); Cmnd 3519). See PARA 208.

4 See the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects launched into Outer Space (London, Moscow and Washington, 22 April 1968; TS 56 (1969); Cmnd 3997).

5 See the Convention on International Liability for Damage caused by Space Objects (London, Moscow and Washington, 29 March 1972; TS 16 (1974); Cmnd 5551).

6 See the Convention on Registration of Objects launched into Outer Space (New York, 14 January 1975; TS 70 (1978); Cmnd 7271).

7 See the Agreement governing Activities of States on the Moon and other Celestial Bodies 1979. The Agreement can be found in 18 ILM (1979) 1434. See further 1 Oppenheim's International Law (9th Edn) 836-838.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/9. AIR SPACE, OUTER SPACE, AND ANTARCTICA/(2) OUTER SPACE/208. The Outer Space Treaty.

## **208. The Outer Space Treaty.**

Under the provisions of the Outer Space Treaty<sup>1</sup>, the exploration and use of outer space is to be carried out for the benefit and in the interests of all countries<sup>2</sup>. Outer space is free for exploration and use by all states on a basis of equality and in accordance with international law; there is freedom of access to all areas of celestial bodies, and freedom of scientific research; and states must facilitate co-operation in scientific investigation<sup>3</sup>. Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use, occupation or by any other means<sup>4</sup>.

1 The Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies (London, Moscow and Washington, 27 January 1967; TS 10 (1968); Cmnd 3519).

2 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies art I.

3 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies art I. See also art II.

4 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies art III. There is no definition in international law of the lower limit of outer space.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/9. AIR SPACE, OUTER SPACE, AND ANTARCTICA/(2) OUTER SPACE/209. Demilitarisation.

## **209. Demilitarisation.**

The states parties to the Outer Space Treaty<sup>1</sup> undertake not to place in orbit round the earth any nuclear weapons or weapons of mass destruction, install them on celestial bodies or otherwise station them in outer space<sup>2</sup>. The moon and other celestial bodies must be used exclusively for peaceful purposes; military bases, installations and fortifications testing military manoeuvres thereon are forbidden<sup>3</sup>.

1 The Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies (London, Moscow and Washington, 27 January 1967; TS 10 (1968); Cmnd 3519).

2 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies art IV. For provisions for observation and inspection see arts X-XII. See also General Assembly Resolution 1884 (XVIII) of 17 October 1963. Nuclear testing in outer space is forbidden by the Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water (Moscow, 5th August 1963; TS 3 (1964); Cmnd 2245) art I para 1(a).

3 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies art IV.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/9. AIR SPACE, OUTER SPACE, AND ANTARCTICA/(2) OUTER SPACE/210. State responsibility.

## **210. State responsibility.**

International responsibility for activities in outer space is borne by states parties to the Outer Space Treaty<sup>1</sup> whether these are carried out by governmental agencies or non-governmental entities<sup>2</sup>. The activities of non-governmental entities require authorisation and supervision by their state<sup>3</sup>. When activities are carried out by international organisations, responsibility for compliance with the Treaty is borne by the international organisation and the states parties to the Treaty participating in such organisation<sup>4</sup>. A state which launches or procures the launching of an object into outer space, and each state from whose territory or facilities an object is launched, is internationally liable for damage to another state or to its natural or juridical persons on earth, in the air space or in outer space<sup>5</sup>.

1 The Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies (London, Moscow and Washington, 27 January 1967; TS 10 (1968); Cmnd 3519).

2 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies art VI.

3 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies art VI.

4 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies art VI. See also arts IX, X, XIII.

5 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies art VII (supplemented by the Convention on International Liability for Damage caused by Space Objects (London, Moscow and Washington, 29 March 1972; TS 16 (1974); Cmnd 5551), which imposes strict liability to pay compensation for damage caused by a space object to something on the surface of the earth or to aircraft in flight (art II), and liability on the basis of fault in other cases (art III).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/9. AIR SPACE, OUTER SPACE, AND ANTARCTICA/(2) OUTER SPACE/211. Enforcement of United Kingdom's international obligations.

## **211. Enforcement of United Kingdom's international obligations.**

The Outer Space Act 1986<sup>1</sup> confers licensing powers on the Secretary of State to secure compliance with international obligations of the United Kingdom<sup>2</sup> with respect to the launching or procuring the launching of a space object<sup>3</sup>, operating a space object<sup>4</sup> and any other activity carried on<sup>5</sup> in outer space<sup>6</sup>.

1 The Outer Space Act 1986 came into force on 31 July 1989: see s 15(1); and the Outer Space Act 1986 (Commencement) Order 1989, SI 1989/1097. The Act extends to England and Wales, Scotland and Northern Ireland: Outer Space Act 1986 s 15(5). The Act also extends to bodies incorporated under the law of the Bailiwicks of Guernsey and Jersey, to the Isle of Man, Gibraltar, Cayman Islands and Bermuda, subject, in each case, to specified exceptions and modifications: see ss 2(3), 15(6); and the Outer Space Act 1986 (Guernsey) Order 1990, SI 1990/248; the Outer Space Act 1986 (Isle of Man) Order 1990, SI 1990/596; the Outer Space Act 1986 (Jersey) Order 1990, SI 1990/597; the Outer Space Act 1986 (Gibraltar) Order 1990, SI 1996/1916; the Outer Space Act 1986 (Cayman Islands) Order 1998, SI 1998/2563; and the Outer Space Act 1986 (Bermuda) Order 2006, SI 2006/2959.

2 As to the international obligations see PARA 207. As to the Secretary of State see PARA 29.

3 Outer Space Act 1986 s 1(a). 'Space object' includes component parts of a space object, its launch vehicle and the component parts of that: s 13(1).

4 Outer Space Act 1986 s 1(b).

5 A person carries on an activity if he causes it to occur or is responsible for its continuing: Outer Space Act 1986 s 13(2).

6 Outer Space Act 1986 s 1(c). 'Outer space' includes the moon and other celestial bodies: s 13(1).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/9. AIR SPACE, OUTER SPACE, AND ANTARCTICA/(2) OUTER SPACE/212. Licensing of activities.

## **212. Licensing of activities.**

A person<sup>1</sup> must not carry on any activity<sup>2</sup> unless a licence has been granted by the Secretary of State<sup>3</sup>, except where the person is acting as employee or agent of another<sup>4</sup> or in the case of activities in respect of which arrangements have been made between the United Kingdom and another country to secure compliance with its international obligations<sup>5</sup>. If it appears to the Secretary of State that an unlicensed activity is being carried on, the Secretary of State may give such directions as are necessary to secure compliance with the United Kingdom's international obligations<sup>6</sup>.

The Secretary of State may grant a licence if he thinks fit<sup>7</sup>, but he must not grant a licence unless he is satisfied that the activity to be authorised: (1) will not jeopardise public health or safety of persons or property<sup>8</sup>; (2) will be consistent with the United Kingdom's international obligations<sup>9</sup>; and (3) will not impair the United Kingdom's national security<sup>10</sup>. The Secretary of State may make regulations as to the form and procedure of applications and to prescribe fees in connection with them<sup>11</sup>.

A licence must describe the authorised activities and is granted for such period and subject to such conditions as the Secretary of State thinks fit<sup>12</sup>. A licence may in particular contain conditions with regard to the supervision and conduct of activities, insurance against liability in respect of damage suffered by third parties, disposal of the payload on the termination of operations and termination of the licence on the occurrence of a specified event<sup>13</sup>. If it appears to the Secretary of State that an activity is being carried on in contravention of the conditions of the licence, the Secretary of State may give such directions as are necessary to secure compliance with the conditions of the licence<sup>14</sup>.

A licence may be transferred with the written consent of the Secretary of State and in other such cases as may be prescribed<sup>15</sup>. The Secretary of State may revoke, vary or suspend a licence with the consent of the licensee where it appears to the Secretary of State that a condition or regulation has not been complied with<sup>16</sup> or that it is necessary to make the revocation, variation or suspension of the licence in the interests of public health or national security or to comply with any international obligation of the United Kingdom<sup>17</sup>.

1     ie a United Kingdom national, Scottish firm or a body incorporated in the United Kingdom: Outer Space Act 1986 s 2(1). 'United Kingdom national' means an individual who is: (1) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen; (2) a person who under the British Nationality Act 1981 is a British subject; or (3) a British protected person within the meaning of the British Nationality Act 1981: Outer Space Act 1986 s 2(2) (amended by virtue of the British Overseas Territories Act 2002 s 1(2)). As to British nationality see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**.

2     ie an activity to which the Outer Space Act 1986 applies: see PARA 211.

3     Outer Space Act 1986 s 3(1). As to the Secretary of State see PARA 29.

4     Outer Space Act 1986 s 3(2) (a).

5     Outer Space Act 1986 s 3(2) (b). The Secretary of State may also by order except other persons or activities if he is satisfied that the requirement of a licence is not necessary to secure compliance with the United Kingdom's international obligations: s 3(3).

6     Outer Space Act 1986 s 8(1). He may, in particular, give such directions as appear to him necessary to secure the cessation of the activity or the disposal of any space object: s 8(2). The Secretary of State may apply for an injunction to secure compliance with a direction: see s 8(3). Where an unlicensed activity is being carried

on or a direction has not been complied with, a justice of the peace may issue a warrant authorising a named person to take direct action to secure compliance with the United Kingdom's international obligations: see s 9.

7 Outer Space Act 1986 s 4(1).

8 Outer Space Act 1986 s 4(2)(a).

9 Outer Space Act 1986 s 4(2)(b).

10 Outer Space Act 1986 s 4(2)(c).

11 See the Outer Space Act 1986 s 4(3); and the Outer Space Act 1986 (Fees) Regulations 1989, SI 1989/1306 (amended by SI 1993/406; SI 1998/2032). The Secretary of State may make regulations prescribing anything required or authorised to be prescribed under the Outer Space Act 1986, and generally for carrying the Act into effect: s 11(1). Such regulations must be made by statutory instrument: see s 11(2).

12 Outer Space Act 1986 s 5(1).

13 See the Outer Space Act 1986 s 5(2).

14 Outer Space Act 1986 s 8(1). As to enforcement of directions and warrants issued by a justice of the peace authorising direct action see ss 8, 9.

15 Outer Space Act 1986 s 6(1).

16 Outer Space Act 1986 s 6(2)(a).

17 Outer Space Act 1986 s 6(2)(b). The suspension, revocation or expiry of a licence does not affect the obligations of the licensee under the conditions of the licence: s 6(3).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/9. AIR SPACE, OUTER SPACE, AND ANTARCTICA/(2) OUTER SPACE/213. Offences.

### 213. Offences.

It is an offence to: (1) carry on an unlicensed activity<sup>1</sup>; (2) make knowingly or recklessly a statement which is false in a material particular, for the purpose of obtaining a licence<sup>2</sup>; (3) fail to comply with the conditions of the licence<sup>3</sup>; (4) fail to comply with a direction<sup>4</sup>; (5) intentionally obstruct a person in the exercise of the powers conferred by a warrant authorising direct action<sup>5</sup>; (6) fail to comply with any regulations<sup>6</sup>. A person<sup>7</sup> committing such an offence is liable on conviction on indictment to a fine and on summary conviction to a fine not exceeding the statutory maximum<sup>8</sup>. It is a defence (except in relation to heads (2) and (5) above) for the accused to show that he used all due diligence and took all reasonable precautions to avoid commission of the offence<sup>9</sup>.

Where it is proved that an offence committed by a body corporate was committed with the consent or connivance of, or is attributable to neglect by, a director<sup>10</sup>, secretary or other similar officer of that body corporate, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly<sup>11</sup>.

1 Outer Space Act 1986 s 12(1)(a). An unlicensed activity is an activity carried on in contravention of s 3 (the licensing requirement): see PARA 212.

2 Outer Space Act 1986 s 12(1)(b).

3 Outer Space Act 1986 s 12(1)(c).

4 Outer Space Act 1986 s 12(1)(d). The direction referred to in the text is a direction under s 8: see PARA 212.

5 Outer Space Act 1986 s 12(1)(e). As to warrants authorising direct action see s 9.

6 Outer Space Act 1986 s 12(1)(f).

7 Persons against whom criminal proceedings may be brought are not restricted to persons in the Outer Space Act 1986 s 2 (see PARA 212): s 12(7). As to persons to whom this Act does not apply in respect of activities carried on outside the United Kingdom see s 12(6). Proceedings for an offence committed outside the United Kingdom may be taken and the offence may for incidental purposes be treated as having been committed in any place in the United Kingdom: s 12(4). As to the meaning of 'United Kingdom' see PARA 30 note 3.

8 Outer Space Act 1986 s 12(2). As to the statutory maximum see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140.

9 Outer Space Act 1986 s 12(5).

10 'Director', in relation to a body corporate whose affairs are managed by the members, means a member of the body corporate: Outer Space Act 1986 s 12(3).

11 Outer Space Act 1986 s 12(3).



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/9. AIR SPACE, OUTER SPACE, AND ANTARCTICA/(2) OUTER SPACE/214. Register of space objects.

**214. Register of space objects.**

The Secretary of State must maintain a register of space objects<sup>1</sup> containing such particulars of space objects as the Secretary of State considers appropriate to comply with the United Kingdom's international obligations<sup>2</sup>. Any person may inspect a copy of the register on payment of the appropriate fee<sup>3</sup>.

1 Outer Space Act 1986 s 7(1). As to the meaning of 'space object' see PARA 211 note 3. As to the Secretary of State see PARA 29.

2 Outer Space Act 1986 s 7(2).

3 Outer Space Act 1986 s 7(3).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/9. AIR SPACE, OUTER SPACE, AND ANTARCTICA/(2) OUTER SPACE/215. Obligation to indemnify the government against claims.

**215. Obligation to indemnify the government against claims.**

A person<sup>1</sup> must indemnify the United Kingdom government against any claims brought against the government in respect of damage or loss<sup>2</sup> arising out of activities carried on by him<sup>3</sup>.

1 As to the persons to whom the Outer Space Act 1986 applies see PARA 212 note 1. Section 10 does not apply to a person acting as employee or agent of another: s 10(2)(a).

2 The Outer Space Act 1986 s 10 does not apply to damage or loss resulting from anything done on the instructions of the Secretary of State: s 10(2)(b). As to the Secretary of State see PARA 29.

3 Outer Space Act 1986 s 10(1).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/9. AIR SPACE, OUTER SPACE, AND ANTARCTICA/(2) OUTER SPACE/216. Astronauts.

**216. Astronauts.**

States must render astronauts who land on the territory of a state, or on the high seas, all possible assistance in the event of accident, distress or emergency; and the astronauts must be safely and promptly returned to the state of registry of their space vehicle<sup>1</sup>. In carrying out their activities, astronauts must assist astronauts of other states; and states must make public any phenomena they discover in outer space which could be a danger to astronauts<sup>2</sup>.

1 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies (London, Moscow and Washington, 27 January 1967; TS 10 (1968); Cmnd 3519) art v This is supplemented by the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects launched into Outer Space (London, Moscow and Washington, 22 April 1968; TS 56 (1969); Cmnd 3997).

2 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies art V.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/9. AIR SPACE, OUTER SPACE, AND ANTARCTICA/(2) OUTER SPACE/217. Jurisdiction over space objects.

**217. Jurisdiction over space objects.**

A state on whose registry an object launched into outer space is carried retains jurisdiction and control over it and over any of its personnel while in outer space or on a celestial body<sup>1</sup>. Ownership of such objects is not affected by their presence in those places or by their return to earth, and, if found beyond the limits of the state of registration, they must be returned to that state<sup>2</sup>.

1 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies (London, Moscow and Washington, 27 January 1967; TS 10 (1968); Cmnd 3519) art VIII. See the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects launched into Outer Space (London, Moscow and Washington, 22 April 1968; TS 56 (1969); Cmnd 3997).

2 See note 1.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/9. AIR SPACE, OUTER SPACE, AND ANTARCTICA/(3) ANTARCTICA/218. The Antarctic Treaty.

### (3) ANTARCTICA

#### 218. The Antarctic Treaty.

Certain states (including the United Kingdom<sup>1</sup>) have laid claim to sovereignty over various sectors of the continent of Antarctica. Some of these claims have been recognised by some other states; others have not<sup>2</sup>.

The United Kingdom is a party to the Antarctic Treaty<sup>3</sup> and the Protocol on Environmental Protection to the Antarctic Treaty<sup>4</sup> and has implemented their provisions in the Antarctic Act 1994<sup>5</sup>. The United Kingdom is also a party to the Convention on the Conservation of Antarctic Marine Living Resources<sup>6</sup>, which is implemented by EC Regulations<sup>7</sup>.

No acts or activities taking place in Antarctica, while the Antarctic Treaty is in force, are to constitute a basis for asserting, supporting or denying a claim to sovereignty or for creating any rights of sovereignty; no new claim may be asserted while the treaty is in force<sup>8</sup>, and existing rights are preserved<sup>9</sup>. Antarctica is to be used for peaceful purposes only, and any measures of a military nature are prohibited<sup>10</sup>. There is provision for a system of inspection by the appointment of observers<sup>11</sup>. Observers are subject only to the jurisdiction of their own states in respect of acts or omissions while they are in Antarctica for the purpose of exercising their functions<sup>12</sup>. The states parties to the Treaty are to agree on measures by way of recommendations adopted at consultation meetings<sup>13</sup>.

1 Examples of British claims include the Letters Patent dated 21 July 1908 and 28 March 1917, concerning the Falkland Islands Dependencies. See generally Waldock, *Disputed Sovereignty in the Falkland Islands Dependencies*, 25 BYIL 311. The British Antarctic Territory is now a British overseas territory constituted by the British Antarctic Territory Order 1989, SI 1989/842: see **COMMONWEALTH** vol 13 (2009) PARA 855.

2 In 1955 the United Kingdom instituted proceedings against Argentina and Chile before the International Court of Justice in respect of claims to overlapping sectors of Antarctica. Failing any acceptance by the respondent states of the jurisdiction of the court, the applications were removed from the court's list in 1956: see *Antarctica Cases (United Kingdom v Argentina)* ICJ Reports 1956, 12; and *(United Kingdom v Chile)* ICJ Reports 1956, 15.

3 Antarctic Treaty (Washington, 1 December 1959; TS 97 (1961); Cmnd 1535). The Treaty entered into force on 23 June 1961. As to the treaty's duration see art XII.

4 I.e. the Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991; TS 6 (1999); Cm 4256).

5 See **ANIMALS** vol 2 (2008) PARAS 990-993.

6 I.e. the Convention on the Conservation of Antarctic Marine Living Resources (Canberra, 7 May 1980; TS 48 (1982); Cmnd 8714).

7 See EC Council Decision 1981/691 (OJ L252, 5.9.1981, pp 26-35) on the conclusion of the Convention on the conservation of Antarctic marine living resources; EC Council Regulation 1035/2001 (OJ L145, 31.5.2001, pp 1-9) establishing a catch documentation scheme for *Dissostichus* spp; EC Council Regulation 600/2004 (OJ L97, 1.4.2004, p 1-15) laying down certain technical measures applicable to fishing activities in the area covered by the Convention on the conservation of Antarctic marine living resources; and EC Council Regulation 601/2004 (OJ L97, 1.4.2004, pp 16-29) laying down certain control measures applicable to fishing activities in the area covered by the Convention on the conservation of Antarctic marine living resources.

8 Antarctic Treaty art IV para 2.

9 Antarctic Treaty art IV para 1.

10 Antarctic Treaty art I. This includes the establishment of military bases and fortifications, manoeuvres and the testing of weapons (art I para 1), but does not preclude the use of military personnel or equipment for scientific and other peaceful purposes (art I para 2).

11 Antarctic Treaty art VII.

12 Antarctic Treaty art VIII. See also **COMMONWEALTH**.

13 Antarctic Treaty art IX.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/219. Jurisdiction in international law.

## 10. JURISDICTION

### (1) GENERAL PRINCIPLES

#### 219. Jurisdiction in international law.

The jurisdiction of a state in international law denotes the competence of the state to govern persons and property by its domestic law. It includes: (1) competence to prescribe rules of conduct<sup>1</sup>; (2) competence to enforce those rules of conduct by executive action<sup>2</sup>; and (3) competence to try individuals and hear causes of action by judicial means<sup>3</sup>. The rules of international law concerning jurisdiction are not concerned with the substantive municipal law of a state, which is usually a matter of its domestic jurisdiction. The international law on jurisdiction generally confers powers on a state to act, although states are increasingly bound by international law to exercise their powers in particular ways, generally by the enactment of appropriate national laws. Some jurisdictional powers may be exclusive to one state; others may be exercised concurrently with the jurisdiction of other states<sup>4</sup>. Although the basic principles of the law on jurisdiction are established by customary international law, there is increasing action under treaty, sometimes specific to particular crimes or categories of crimes, most notably in counter-terrorism treaties<sup>5</sup>. Human rights law has an impact on the exercise of states' jurisdiction<sup>6</sup>. Whilst jurisdiction may be concerned with civil matters or criminal matters, only criminal matters are discussed in the following paragraphs<sup>7</sup>.

1 See PARA 221 et seq.

2 For example, investigation and the detention of suspects and defendants: see PARA 230.

3 See PARAS 221, 232 et seq. For a discussion of the international rules of jurisdiction generally see the *Lotus Case* PCIJ Ser A No 10 (1927).

4 Prescriptive jurisdiction is concurrent, so that where a national of one state indulges in conduct in another state and the act is contrary to the law of both states then both states have jurisdiction. A particular example is where a national of one state commits an offence on board a merchant vessel of another state, at a time when that vessel is in a port of a third state. All three states may have prescriptive jurisdiction over the conduct. As to jurisdiction over offences committed on merchant ships see PARAS 138, 150. Concurrence of judicial jurisdiction (eg where one state seeks the extradition of a defendant from a state where he might also be put on trial) is becoming increasingly common: see *R (on the application of Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727, [2006] 3 All ER 239. See also the Attorney-General's Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States, 18 January 2007; and *R (on the application of Ahsan) v DPP* [2008] EWHC 666 (Admin), [2008] All ER (D) 149 (Apr) at [14]-[42].

5 As to International Criminal Law see PARA 421 et seq.

6 This is mainly with regard to procedural standards of fair criminal trial: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134 et seq. There is some effect on substantive jurisdiction, negatively in restricting certain exercises of prescriptive criminal jurisdiction (see eg *Dudgeon v United Kingdom* A/45 (1981) 4 EHRR 149, ECtHR) and in permitting exceptions to the non-retrospectivity principle of criminal law, where the conduct constituted a crime according to international law at the time of its commission, even if it did not in domestic law (see the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969; ETS no 5) art 7; and the International Criminal Courts Act 2001 s 65A (not yet in force) (see PARAS 454-455)).

7 Regulatory law accompanied by coercive sanctions is 'criminal' in this sense, although there may be some differences about the reach of regulatory jurisdiction compared to 'pure' criminal law. As to jurisdiction in civil

matters see **CIVIL PROCEDURE; CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 34, 62 et seq. See also the British government's intervention in *Sosa v Alvarez-Machin* 124 S Ct 2739, reproduced in (2004) BYIL 770, expressing concerns about extensive extraterritorial civil jurisdiction.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/220. English law and international law.

## 220. English law and international law.

The exercise of jurisdictional powers will ordinarily be through acts of and under national legislation<sup>1</sup> The examples given here are mainly from English law (which includes the common law as an exercise of prescriptive jurisdiction) but it should not be understood that the discretions exercised by the English authorities in all cases go to the maximum of what international law would permit<sup>2</sup>. Until recently, the United Kingdom has been cautious about exercising extraterritorial, prescriptive criminal jurisdiction<sup>3</sup>. The pre-eminence of the territorial principle is as much a reflection of the principles of the common law and pragmatic matters such as the availability of evidence as it is of a conscious adoption of international law<sup>4</sup>.

1 From the perspective of national law, there must be a legal basis for the criminal conduct, for executive action taken in pursuance of the investigation and prosecution of crime and for the jurisdiction of a court before which any trial takes place. From the point of view of international law, all these actions must be taken under laws which conform to the limits of jurisdiction which international law provides.

2 Now, the courts no longer claim a right to create new crimes at common law (see *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, [1972] 2 All ER 898, HL) and crimes at common law are purely territorial, so that considerations of international legality of prescriptive jurisdiction are unlikely to arise; see, however, PARA 224.

3 For instance, the United Kingdom has made only limited use of the nationality principle as a basis for criminal jurisdiction: see PARA 225.

4 See *Air India v Wiggins* [1980] 2 All ER 593, [1980] 1 WLR 815, HL.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/221. Jurisdiction to prescribe conduct.

## 221. Jurisdiction to prescribe conduct.

State practice discloses the existence of five principles upon which claims to prescribe rules of conduct<sup>1</sup> are based and on which the United Kingdom has from time to time relied<sup>2</sup>. These are: (1) the territorial principle, on the basis of which a state criminalises conduct which takes place within its territory (which may include quasi-territorial areas such as ships, aircraft of spacecraft)<sup>3</sup>; (2) the nationality or active personality principle, on the basis of which a state criminalises the conduct of its nationals outside its territory<sup>4</sup>; (3) the protective principle, on the basis of which a state criminalises conduct occurring outside its territory which seriously affects any important national interest<sup>5</sup>; (4) the passive nationality or passive personality principle, on the basis of which a state criminalises conduct outside its territory of which its national is the victim<sup>6</sup>; and (5) the universal principle, on the basis of which a state criminalises conduct wherever it takes place, regardless of the nationality of the person whose conduct it is or the nationality of the victim<sup>7</sup>.

1 'Conduct' includes acts and omissions. 'Conduct' constituting a crime may occur in more than one state and some 'conduct' may be regarded as continuing from one state to another: *Treacy v DPP* [1971] AC 537, 55 Cr App Rep 113, HL.

2 As to enforcement and judicial jurisdiction see PARA 230.

3 See PARAS 222-223.

4 See PARA 225.

5 See PARA 226.

6 See PARA 228.

7 See PARA 227; and the Harvard Research, Draft Convention on Jurisdiction with respect to Crime (1935), Introductory Comment, 29 American Journal of International Law Supp 435 at 439. This document does not, however, accept that the passive personality principle is a rule of international law: see at 578-579.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/222. Territorial principle.

## 222. Territorial principle.

A state has jurisdiction on the territorial principle to criminalise conduct which occurs within its territory<sup>1</sup>. The power to regulate conduct occurring in its territory, both in terms of the substantive rules which apply and to identify the persons bound by those rules is a fundamental characteristic of the state<sup>2</sup>. A state may exercise jurisdiction on the basis of the territorial principle by making criminal conduct only part of which occurs within its territory and it may regard continuing conduct, which may occur in more than one state, as occurring in its territory for the purpose of exercising jurisdiction on the territorial principle<sup>3</sup>.

For this purpose, the territory of a state generally includes its land territory, its internal or national waters, its territorial waters and the air space above those areas and its quasi-territorial regimes, such as ships, aircraft, and space vehicles<sup>4</sup>.

While there are few limits on the exercise of a state's substantive territorial prescriptive jurisdiction, its powers to investigate, try and punish infractions of those rules are subject to rules of law with respect to immunity from the jurisdiction of a state enjoyed by other states and their instrumentalities, diplomatic agents, consular agents, international organisations and others<sup>5</sup>.

1 There are few, if any rules of customary international law which limit the substantive power of the state to make conduct in its territory criminal, although it is sometimes suggested that a state does not have the right to conscript aliens on its territory into its armed forces and to make non-compliance criminal: see *Polites v Commonwealth* (1945) 70 CLR 60, Aust HC. Human rights treaties may forbid the criminalisation of certain conduct within a state's territory: see *Dudgeon v United Kingdom* A 45 (1981), 4 EHRR 149, ECtHR. A 'crime' in this context means an act or omission which is made an offence by the domestic law of the state assuming jurisdiction. For a statement that a state has exclusive competence with regard to its own territory see *Island of Palmas Case* 2 RIAA 829 at 838-839 (1928). For statements of this principle as a general principle of English law see *R v Page* [1954] 1 QB 170 at 175, [1953] 2 All ER 1355 at 1356, 7 BILC 895, C-MAC, per Goddard CJ; *Cox v Army Council* [1963] AC 48 at 67, [1962] 1 All ER 880 at 882, 8 BILC 377, HL, per Viscount Simonds.

2 See PARA 32.

3 See PARA 223.

4 As to land territory see PARA 111; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1055. As to internal or national waters see PARA 121; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1056. As to territorial waters see PARA 123; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1057. As to air space and crimes committed aboard aircraft see PARA 197 et seq; and **AIR LAW** vol 2 (2008) PARA 620 et seq; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1058.

5 As to immunities of states and sovereigns see PARA 243 et seq; as to diplomatic immunity see PARA 265 et seq; as to consular immunity see PARA 290 et seq; and as to the immunity of international organisations and of persons connected with them see PARA 307 et seq. Immunities do not imply exceptions to the prescriptive jurisdiction of the forum state but rather to its executive and judicial jurisdiction to investigate and prosecute certain persons for conduct in its territory or elsewhere which the forum state has made criminal.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/223. Extensions of the territorial principle.

### 223. Extensions of the territorial principle.

Under what is known as the subjective territorial principle, a state has jurisdiction to criminalise conduct which takes place in its own territory even when the consequence of that conduct takes place outside its territory, it being understood that 'consequence' here means a part of the offence and not merely some non-criminal effect within the state<sup>1</sup>. Under what is known as the objective territorial principle, a state has jurisdiction to criminalise conduct which takes place outside its territory if the consequence of that conduct takes place within its own territory<sup>2</sup>. The criminal law of England and Wales has not adopted either principle consistently, although examples can be found relying on each<sup>3</sup>. The objective territorial principle only applies if what are the consequences of the act are an essential or constituent element of the crime which is alleged to have been committed and, as such, the so-called 'effects' principle has no foundation as an aspect of the territorial principle<sup>4</sup>.

1 Eg if a person in France discharges a gun, killing another in Germany, France has jurisdiction. For examples in English law see *Treacy v DPP* [1971] AC 537 at 546, [1971] 1 All ER 110, 9 BILC 212, HL; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1059.

2 In the example given in note 1, Germany would also have jurisdiction. In the *Lotus Case* PCIJ Ser A No 10 (1927), a French officer on board a French vessel on the high seas was accused in a Turkish court of negligent navigation which caused a collision with a Turkish vessel, persons on which were killed. The Permanent Court of International Justice held that Turkey had jurisdiction, since the constituent element of the offence resulting from the officer's conduct took place on Turkish territory. This was based on the hypothesis that the Turkish ship was Turkish territory. On this point the case was partly overruled by the United Nations Convention on the Law of the Sea (Montego bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 97, which reserves the exercise of judicial penal jurisdiction 'for collision or any other incident of navigation' to the flag state: see PARA 150. This does not, however, affect the objective territorial principle as stated in the text. See also the Convention on Offences and certain other Acts committed on Board Aircraft (Tokyo Convention) (Tokyo, 14 September 1963; TS 126 (1969); Cmnd 4230) art 4(a); and PARA 201. For examples in municipal law see *Fermanagh County Council v Farrendon* [1923] 2 IR 180; *R v Baxter* [1972] 1 QB 1, [1971] 2 All ER 359, CA; *Secretary of State for Trade v Markus* [1976] AC 35, [1975] 1 All ER 958, HL. Extradition cases bear out the principle: see especially *R v Nillins* (1884) 53 LJMC 157, 5 BILC 446, DC; *R v Godfrey* [1923] 1 KB 24, 5 BILC 507; *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67, [2006] 2 AC 1, [2006] 1 All ER 647 at [40] per Lord Hope (with regard to conduct and double criminality in extradition). For examples of United States law see *Adams v The People* 1 Comst 173 (USA 1848); *Ford v United States* 273 US 593 (1927).

3 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1059.

4 The usual source of the effects doctrine is the judgment in *United States v Aluminum Co of America* 148 F 2d 416 (1945) at 443, although the full consequences of that judgment have been modified by *Timberlane Lumber v Bank of America* 549 F 2d 597 (1976) and *Mannington Mills v Congoleum Corp* 595 F 2d 1287 (1979). See Jennings 'Extraterritorial Jurisdiction and the United States Anti-Trust Laws' 33 BYIL 146 at 159-160. The United Kingdom government has emphasised the need for some part of the offence to have taken place in the territory of the state assuming jurisdiction: Aide-Memoire of HM Government to the Commission of the European Communities, 20 October 1969, British Practice in International Law 1967, 58. Although this was written in connection with anti-trust proceedings and not criminal proceedings, the statements made therein are equally applicable to both.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/224. Territorial jurisdiction and participation; attempts and conspiracy.

## **224. Territorial jurisdiction and participation; attempts and conspiracy.**

The extensions of the territorial principle<sup>1</sup> apply also to participation in or attempts to commit a crime which take place in one state, the substantive crime being committed or being intended to be committed in another. The state in which the participation or attempt occurred, and the state in which its consequence occurred, both have jurisdiction<sup>2</sup>. A state has jurisdiction over a person accused of conspiracy to commit a crime if: (1) the formation of the conspiracy takes place within the territory of that state even though things are done in pursuance of the conspiracy outside its territory<sup>3</sup>; or (2) if the formation of the conspiracy takes place outside its territory and it is a conspiracy to commit a crime within the territory<sup>4</sup>.

<sup>1</sup> See PARA 223.

<sup>2</sup> See *DPP v Stonehouse* [1978] AC 55, [1977] 2 All ER 909, HL.

<sup>3</sup> Aide-memoire of HM Government to the Commission of the European Communities, 20 October 1969, British Practice in International Law 1967, 58; but see PARA 810 note 5. It has been held that in such cases a conspiracy in England to commit a crime abroad is indictable only if the conduct constituting that crime would be an offence by English law: *Board of Trade v Owen* [1957] AC 602, [1957] 1 All ER 411, 7 BILC 622, HL; *R v Cox* [1968] 1 All ER 410, [1968] 1 WLR 88, 9 BILC 207, CA; *R v Governor of Brixton Prison, ex p Rush* [1969] 1 All ER 316, [1969] 1 WLR 165, 9 BILC 544, DC. As to conspiracy to commit offences abroad see now also the Criminal Law Act 1977 s 1A (added by the Criminal Justice (Terrorism and Conspiracy) Act 1998 s 5(1)); the Sexual Offences (Conspiracy and Incitement) Act 1996 s 2; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 243.

<sup>4</sup> As to conspiracies formed abroad to commit offences in England see *DPP v Doot* [1973] AC 807, [1973] 1 All ER 940, HL; *Somchai Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225, [1990] 2 All ER 866, PC; *R v Sansom* [1991] 2 QB 130, [1991] 2 All ER 145, CA; *R v Latif and Shahzad* [1996] 1 All ER 353, [1996] 1 WLR 104, HL; *R (on the application of Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 AC 556, sub nom *Re Al-Fawwaz* [2002] 1 All ER 545. See also the Criminal Justice Act 1993 Pt I (ss 1-6); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 362.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/225. Nationality or active personality principle.

## 225. Nationality or active personality principle.

A state has jurisdiction to make criminal conduct by its nationals when that conduct occurs outside its territory<sup>1</sup>. This principle extends also to crimes committed by certain classes of aliens, who are for this purpose assimilated to nationals<sup>2</sup>. Jurisdiction should only be exercised by the state of the offender's nationality if it does not cause an interference with the legitimate affairs of other states or cause the national to act in a manner contrary to the law of the state in which he finds himself<sup>3</sup>. There is an increasing tendency to criminalise some extra-territorial conduct of those resident in the United Kingdom<sup>4</sup>.

1 Eg the Offences against the Person Acts 1861 s 9 gives jurisdiction over murder or manslaughter committed by a British subject while abroad; the Merchant Shipping Act 1995 s 281 gives jurisdiction over offences committed by British passengers on a foreign ship (see *R v Kelly* [1982] AC 665, [1981] 2 All ER 1098, HL); and the Anti-terrorism, Crime and Security Act 2001 s 109 gives jurisdiction over bribery and corruption committed outside the United Kingdom). See generally **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1061.

By virtue of the fact that the person who is prosecuted is a national of the state assuming jurisdiction over him, his prosecution and punishment cannot in general give rise to any breach of international law.

2 This includes persons who are holders of public offices in the state (see the Criminal Justice Act 1948 s 31) or who are members of its armed forces (Armed Forces Act 2006 s 42(1)). See also the Intelligence Services Act 1994 s 7(1) which removes liability for crimes committed overseas if done on the authorisation of the Secretary of State for intelligence purposes.

Foreign members of the crew of a state's merchant vessels enjoy the protection of the state and, as a corollary, are assimilated to its nationals for the purpose of criminal jurisdiction: see the Merchant Shipping Act 1995 ss 281, 282; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1105. By English law aliens who owe allegiance to the Crown are also assimilated to nationals for certain purposes, such as the law of treason, and are thus liable to prosecution for offences abroad: *Joyce v DPP* [1946] AC 347, [1946] 1 All ER 186, 3 BILC 51, HL. See generally **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1062.

3 Aide-memoire of HM Government to the Commission of the European Communities, 20 October 1969, British Practice in International Law 1967, 58. See also 1 Oppenheim's International Law (9th Edn) 462-465. Most states have placed restrictions upon their reliance on the nationality principle, for instance by imposing a requirement of double criminality (see the Sexual Offences Act 2003 s 72(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 243). See also Harvard Research, 29 American Journal of International Law Supp 519-539. Crime is strictly territorial at common law. Since early times, however, statutes have made certain types of conduct abroad criminal, and have provided for their prosecution in England: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1060 et seq. In *R v Azzopardi* (1843) 2 Mood CC 288, 3 BILC 574, CCR, the question was asked by Cresswell J whether a killing of a person in a foreign country which did not constitute homicide by the laws of that country would amount to an offence under what is now the Offences against the Person Act 1861 s 9. The question remained unanswered. Any conflict between the territorial and nationality principles might be avoided if the plea of *autrefois acquit* or *autrefois convict* were available in respect of acts committed abroad: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1064.

4 See the Slave Trade Act 1824, the War Crimes Act 1991, the Sexual Offences Act 2003 and the International Criminal Court Act 2001 ss 51, 67A (see PARA 454) (s 67A not yet in force), which make residence in the United Kingdom as well as nationality a test for jurisdiction in relation to certain acts done abroad.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/226. Protective principle.

## 226. Protective principle.

Under the protective principle a state has jurisdiction to criminalise extra-territorial conduct, regardless of the nationality of the offender, where that conduct is against the security<sup>1</sup>, territorial integrity or political independence of the state<sup>2</sup>. This principle includes jurisdiction over crimes which consist of the falsification, counterfeiting or uttering of falsified copies or counterfeits of the seals, currency, stamps, passports or public documents issued by the state or under its authority<sup>3</sup>.

1 An example is to be found in the Convention on Offences and certain other Acts committed on Board Aircraft (Tokyo Convention) (Tokyo, 14 September 1963; TS 126 (1969); Cmnd 4230) art 4(c) (see PARA 201).

2 British practice does not in general adopt this principle, but it is possible to explain upon this ground the type of case exemplified by *Joyce v DPP* [1946] AC 347, [1946] 1 All ER 186, 3 BILC 51, HL. See also *Naim Molvan (Owner of Motor Vessel Asya) v A-G for Palestine* [1948] AC 351, 1 BILC 674, PC (abetment of illegal immigration by acts on the high seas). Certain offences related to terrorism which are not referable to treaty obligations might also be explained by the protective principle: eg the Terrorism Act 2006 s 8 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 440).

3 Harvard Research, 29 American Journal of International Law Supp 561. The Harvard Research proposed that jurisdiction might not be exercised where the alleged offence was done under cover of a liberty guaranteed by the local law of the state where it was done (although where the conduct poses a threat to a serious security interest of a foreign state, such protection might involve the responsibility of the local state): Harvard Research, 29 American Journal of International Law Supp 543, 557.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/227. Universal principle.

## 227. Universal principle.

In certain cases a state has jurisdiction to criminalise conduct by an alien outside its territory, regardless of the nationality of the victim or of any impact which the conduct may have on a security interest of the state. The implication is that any state may exercise prescriptive jurisdiction over the conduct. At customary international law, piracy is such an offence<sup>1</sup>. Crimes committed outside the jurisdiction of any state<sup>2</sup> may fall within this principle. Universal jurisdiction may be exercised only with respect to conduct which constitutes a crime against international law<sup>3</sup>. War crimes which are crimes under international law are triable by the courts of any state<sup>4</sup>. For the purpose of national jurisdiction other activities which are prohibited by international conventions are sometimes regarded as universal crimes<sup>5</sup>.

1 As to piracy see PARA 155 et seq.

2 Eg crimes committed on ships or floating objects which have no international character. In *R v Wain and Swatoa* (1874) 2 NSWLR 403, it was held that a British ship's long-boat was not a British ship for jurisdictional purposes. A few states have provisions in their penal legislation with respect to crimes committed in a place not subject to the authority of any state, but usually only if these are committed by their own nationals: Harvard Research, 29 American Journal of International Law Supp 588-592. As to Antarctica and jurisdiction over offences committed there see PARA 218; and **ANIMALS** vol 2 (2008) PARAS 990-993.

3 Crimes against international law arise under customary international law: see PARA 421 et seq. States may have obligations under treaties to create crimes in their domestic law equivalent to international crimes, to which prescriptive jurisdictional obligations may attach. For example the Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948; TS 58 (1970); Cmnd 4421). art VI requires only that parties make genocide an offence when it occurs within their territory. There is no treaty obligation to make genocide a crime of universal jurisdiction though states may make it an extraterritorial offence under customary international law: see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007. As to the Genocide Convention see PARA 429.

As to the relation between crimes under customary international law and the law of England and Wales see *R v Jones* [2006] UKHL 16, [2007] 1 AC 136 at [28] per Lord Bingham.

4 See the UK Ministry of Defence *The Manual of the Law of Armed Conflict* (2004) paras 16.20-16.30.3. See also United Nations War Crimes Commission, 15 War Crimes Rep 26 (1949). British military courts have jurisdiction over war crimes committed not only by members of enemy armed forces but also by enemy civilians and certain other categories of persons of any nationality. As to jurisdiction over grave breaches of the Geneva Red Cross Conventions see PARA 426 et seq; and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 421 et seq. However, these are examples of punishment of breaches of international law rather than of acts which are not in themselves breaches of international law which states are free to punish.

5 Eg torture, and slavery and the slave trade: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 124, 125. As to the International Criminal Court see PARA 437 et seq.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/228. Passive nationality or passive personality principle.

## **228. Passive nationality or passive personality principle.**

It is sometimes contended that a state has jurisdiction to make extra-territorial conduct of aliens an offence where the victim of the offence was a national of the legislating state under the passive personality principle<sup>1</sup>. This principle has not secured general acceptance<sup>2</sup>, but it is gaining ground as a basis for the exercise of jurisdiction, particularly where the victims are targeted because of their nationality<sup>3</sup>.

1 Turkey attempted to justify its assumption of jurisdiction on this basis in the *Lotus Case* PCIJ Ser A No 10 (1927) (see PARA 223 note 2). It was not, however, adopted as the ground for the decision of the Permanent Court of International Justice. The principle was relied on in *A-G of the Government of Israel v Eichmann* (1961) 36 Int L R 5, though since the victims were killed before Israel was a state, it was on the basis that they were Jews.

2 The principle was rejected by some of the dissenting judges in the *Lotus Case* PCIJ Ser A No 10 (1927). The United States argued against the existence of this principle in a dispute with Mexico in *Cutting's Case*, Foreign Relations of the United States (1887) 751; Foreign Relations of the United States (1888) vol II, 1114, 1180; 2 Moore's Digest 228 at 235, 242. See, however, the Convention on Offences and certain other Acts committed on Board Aircraft (Tokyo Convention) (Tokyo, 14 September 1963; TS 126 (1969); Cmnd 4230) art 4(b) (see PARA 201).

3 The passive personality principle 'meets with relatively little opposition, at least so far as a particular category of offences are concerned': *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002, 3 at 77 (para 47) (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal). See also the United States Anti-terrorism and Effective Death Penalty Act 1996, Pub L No 104-132.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/229. Extraterritorial application of trade laws and economic sanctions.

## 229. Extraterritorial application of trade laws and economic sanctions.

The courts of the United States have asserted the right to extend the application of United States domestic anti-trust laws<sup>1</sup> to the conduct of foreign corporations which has taken place outside the United States but which is alleged to have affected the trade of the United States<sup>2</sup>. In so far as this assumption of jurisdiction involves extraterritorial enforcement of such laws, directly or indirectly, the English courts would not recognise it<sup>3</sup>. The United Kingdom government has stated that the territorial and nationality principles<sup>4</sup> are exhaustive bases of jurisdiction in such cases, and that it does not regard the territorial principle as warranting the application of domestic anti-trust laws to conduct taking place entirely outside the territory of the state concerned<sup>5</sup>.

1 See, in particular, the Antitrust Act 1890, 26 Stat 209 (United States) (Sherman Act); and the Anti-Trust Act 1914, 38 Stat 730 (United States) (Clayton Act). The considerations which apply to the extraterritorial application of anti-trust measures by the US apply mutatis mutandis to extraterritorial measures for other regulatory purposes: see, in regard to trading relations with Cuba, the Cuban Liberty and Democratic Solidarity (Libertad) Act 1996 110 Stat 785 (United States) (Helms-Burton Act) (trading relations with Cuba); Iran, Libya (terrorism sanctions).

2 In earlier United States decisions, the application of these laws was limited to agreements made abroad in pursuance of which some act was done in the United States, and was not extended to affect conduct which took place entirely outside that country: *American Banana Co v United Fruit Co* 213 US 347 at 356 (1909); see also eg *United States of America v American Tobacco Co* 221 US 106 (1911). These cases were concerned also with transactions involving American companies. In 1944 the United States courts expanded their jurisdiction to such cases where acts were done entirely outside the United States, but were intended to affect and did affect trade with that country (see *United States of America v Aluminum Co of America* 148 F 2d 416 (1945)), and also to cases where no intention necessarily existed (*United States of America v General Electric Co* 115 F Supp 835 (1953)). In the last-mentioned case, however, the orders made against the foreign companies contained a 'savings clause', as they did in *United States of America v Imperial Chemical Industries Ltd* 105 F Supp 215 (1952). See also *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* [1953] Ch 19, [1952] 2 All ER 780, 7 BILC 599, CA; and PARA 231 note 2. However, no such clauses were found in *United States of America v Holophane Co Inc* 119 F Supp 114 (1954) or in *United States of America v Watchmakers of Switzerland Information Center Inc* 113 F Supp 40 (re-argument denied 134 F Supp 710 (1955), 22 Int LR 168). See, however, *Vanity Fair Mills Inc v T Eaton Co Ltd* 352 US 871 (1956), 23 Int LR 134. In *Timberlane Lumber Co v Bank of America* 549 F 2d 597 (1976) and *Mannington Mills Inc v Congoleum Corp* 595 F 2d 1287 (1979), United States courts adopted a 'balancing of interests' test (ie weighing the interests of the United States in having its laws applied against the interests of the other state or states involved). However, in subsequent cases, eg *Laker Airways Ltd v Sabena Belgian World Airlines* 731 F 2d 909 (1984), this test was not applied. See also *Hartford Fire Insurance Co v California* 113 S Ct 2891 (1993) (allegation that London insurance companies acting in the United Kingdom had violated the Sherman Act in refusing to grant reinsurance to United States businesses otherwise than on terms agreed among themselves; defendants argued their conduct was lawful in the United Kingdom and in accordance with United Kingdom law concerning regulation of the insurance market; United States Supreme Court held balance came down in favour of exercising extraterritorial jurisdiction).

Attempts to apply United States anti-trust laws to activities of foreign (including United Kingdom) airlines were the subject of an order made under the Protection of Trading Interests Act 1980: see the Protection of Trading Interests (US Antitrust Measures) Order 1983, SI 1983/900; and PARA 235 note 3.

3 *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* [1953] Ch 19, [1952] 2 All ER 780, 7 BILC 599, CA. As to indirect enforcement see PARA 231.

4 As to the territorial and nationality principles see PARAS 222-225. These are the bases for criminal offences in the United Kingdom (including the conduct of companies incorporated in the UK) when it implements Security Council decisions imposing sanctions on a particular territory by Orders made under the United Nations Act 1946, eg Al-Qaeda and Taliban (UN Measures) Order 2002, SI 2002/111; Somalia (United Nations Sanctions) Order 2002, SI 2002/2628.

5 Aide-Memoire of HM Government to the Commission of the European Communities, 20 October 1969, British Practice in International Law 1967, 58. The European Court of Justice has seemingly upheld the application of principles similar to those adopted in the United States cases referred to in note 2: see Case 48/69 *Imperial Chemical Industries Ltd v EC Commission* [1972] ECR 619, [1972] CMLR 557, ECJ; Case 22/71 *Beguelin Import Co v GL Import Export SA* [1971] ECR 949, [1972] CMLR 81. However, in Cases 89, 104, 114, 116, 117, 125-9/85A *Åhlström Osakeyhtiö v EC Commission (The Woodpulp Cases)* [1988] ECR 5193, [1988] 4 CMLR 901, ECJ, the same court appears to have adopted the objective territorial principle (see PARA 223) (Commission had jurisdiction to impose fines in respect of pricing agreement concluded outside the EEC by non-EEC companies but implemented within the EEC. The exercise of prescriptive jurisdiction was regarded as territorial, regarding the whole of a corporate group as being a single person for the purposes of criminalising its conduct, the acts of subsidiaries within the EEC being attributable to their foreign controlling companies).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/230. Enforcement jurisdiction.

### 230. Enforcement jurisdiction.

The enforcement jurisdiction of a state comprises, inter alia, its powers to investigate crime, to examine witnesses and gather evidence, to question and detain suspects, to initiate prosecutions and to execute any punishment awarded by a court after a criminal trial. Executive jurisdiction of a state is strictly territorial in the sense that a state may not exercise its powers or authority in the territory or jurisdictional area of another state except by virtue of a permissive rule derived from international custom or from a treaty or convention<sup>1</sup>. Thus a state is not entitled to use physical force in the territory of another state to assert its alleged rights<sup>2</sup>. Nor is it entitled to exert peaceable measures on the territory of any other state by way of enforcement of its national laws, civil or criminal, without the consent of that other state, by way for example of service of documents, police or tax investigations, or by the performing of notarial acts<sup>3</sup>.

1 *Lotus Case* PCIJ Ser A No 10 at 18 (1927). For an example of provisions of a convention giving the right to a state to exercise jurisdiction over foreign vessels on the high seas see the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 110; and PARA 148. For further examples of powers of extra-territorial enforcement jurisdiction see the Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty (London, 19 June 1951; TS 3 (1955); Cmnd 9363) arts VII paras 1(a), 2(a), 10(a) (and PARA 325); and the Protocol between the United Kingdom of Great Britain and Northern Ireland and the French Republic concerning Frontier Controls and Policing, Co-operation in Criminal Justice, Public Safety and Mutual Assistance relating to the Channel Fixed Link (Sangatte; 25 November 1991; TS 70 (1993); Cm 2366), and an Additional Protocol thereto (Brussels, 29 May 2000; TS 33 (2002); Cm 5586) (and **POLICE** vol 36(1) (2007 Reissue) PARA 130).

2 States have extensive networks of bilateral and multilateral arrangements to obtain custody of suspects overseas (see **EXTRADITION**) and evidence etc (**CRIMINAL LAW, EVIDENCE AND PROCEDURE**). As to seizure of persons outside the United Kingdom in violation of international law see PARA 233.

3 In English law a subpoena cannot be issued if the addressee is resident outside the United Kingdom, except to enforce a revenue claim against a British subject: *A-G v Prosser* [1938] 2 KB 531, [1938] 3 All ER 32, CA. As to service of documents abroad see also the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 15 November 1965; TS 50 (1969); Cmnd 3986). As to the taking of evidence in England for use in foreign tribunals see the Evidence (Proceedings in Other Jurisdictions) Act 1975; and **CIVIL PROCEDURE** vol 11 (2009) PARA 1055 et seq. The performance of notarial acts by consuls is frequently permitted under consular conventions: see the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219) art 5 (set out in the Consular Relations Act 1968, s 1, Sch 1); and PARA 30. See also PARA 290 et seq. As to forced marriage protection orders which require or forbid conduct outside England and Wales but exclude extra-territorial enforcement see the Family Law Act 1996 Pt 4A; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 723 et seq.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/231. Indirect enforcement.

### 231. Indirect enforcement.

A state may not enforce its own laws or obedience to them in the territory of a foreign state by indirect means, such as by ordering an alien over whom it has personal jurisdiction to do or to refrain from doing an act in the foreign state, without the consent of that foreign state. This prohibition applies to measures taken by way of economic sanctions and intended to operate extraterritorially over persons and property<sup>1</sup>. It also applies to the issuing of injunctions or decrees of specific performance or orders having like effect<sup>2</sup>, and to orders to produce documents situated in the foreign state<sup>3</sup>, if obedience to such orders would be unlawful in the foreign state<sup>4</sup>.

#### 1 Examples include:

- 1 (1) the 'freezing' by the United States of Iranian assets held outside the United States by foreign, including United Kingdom, subsidiaries of United States companies (see 18 ILM (1979) 1549), which English courts refused to accept as effective over Iranian assets held in branches of United States banks in England: *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, [1989] 3 All ER 252; *Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co (No 2)* [1989] 1 Lloyd's Rep 608;
- 2 (2) United States Re-export Control Regulations directed at trade with the Soviet Union, which were the subject of the Protection of Trading Interests (US Re-export Control) Order 1982, SI 1982/885 (see PARA 235);
- 3 (3) the United States Cuban Democracy Act 1992, which prohibited the granting of licences under the United States Assets Control Regulations for certain transactions between United States owned or controlled firms in the United Kingdom and Cuba, which was the subject of a démarche from the European Communities (see 63 BYIL (1992), 725) and of the Protection of Trading Interests (US Cuban Assets Control Regulations) Order 1992, SI 1992/2449, made under the Protection of Trading Interests Act 1980 s 1(1) (see PARA 235);
- 4 (4) the United States Cuban Liberty and Democratic Solidarity Act 1996, by which nationals of third states (eg the United Kingdom) dealing with United States property expropriated by Cuba or using or taking its benefit can be sued before the United States courts and barred from entry into the United States, which was the subject of a protest from the European Union: see 35 ILM (1996) 397;
- 5 (5) the United States Iran and Libya Sanctions Act 1996, which was intended to impose sanctions on persons or entities participating in the development of the petroleum resources of Iran or Libya.

The legislation referred to in heads (4) and (5) was the subject of an order made under the Protection of Trading Interests Act 1980: see the Extraterritorial United States Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996, SI 1996/3171; and PARA 236. This order was a consequence of EC Council Regulation 2271/96 (OJ L309, 29.11.1996, 1) 39, which was issued so as to afford protection to member states against extraterritorial legislation. Subsequently, the European Union and the United States concluded a memorandum of understanding: see the Memorandum of Understanding concerning the United States Helms-Burton Act and the United States Iran and Libya Sanctions Act (11 April 1997) 36 ILM (1997) 529, by which, inter alia, the United States agreed to continue its suspension of the operation of part of the Helms-Burton Act, announced by the President on 3 January 1997 (see 36 ILM (1997) 216) during the remainder of the President's term of office (ie until January 2001).

2 In certain anti-trust cases, the courts of the United States have ordered foreign corporations over whom they had assumed jurisdiction by reason of their doing business or allegedly doing business in that country, to make their conduct in foreign countries conform to United States law: see *United States of America v Imperial Chemical Industries Ltd* 105 F Supp 215 (1952). In subsequent proceedings, the English courts restrained the defendant company from complying with the American order: see *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* [1953] Ch 19, [1952] 2 All ER 780, 7 BILC 593, 599, CA. See also *United States of*

*America v General Electric Co* 115 F Supp 835 (1953), which drew a diplomatic protest from the Netherlands government. As to when a corporation is held to be doing business in the United States by reason of the activities of associated companies see *United States of America v Watchmakers of Switzerland Information Center Inc* 133 F Supp 40; re-argument denied 134 F Supp 710 (1955), 22 Int LR 168. The United Kingdom government has stated its opinion that a state only has personal jurisdiction over a foreign corporation if that corporation carries on business or resides within its territory, and that for this purpose a corporation also carries on business or resides there through an agent if the agent has legal powers to enter into contracts on behalf of the corporation. A corporation does not carry on business within a state merely because its subsidiary does so, unless the subsidiary is an agent in the sense explained. The distinct legal personalities of the parent and subsidiary companies must be respected: see Aide-Memoire of HM Government to the Commission of the European Communities, 20 October 1969, British Practice in International Law 1967, 58. In the case in connection with which this statement was made, the European Court rejected a similar argument, however, on the basis that the subsidiary companies in question enjoyed no real autonomy in the matter: Case 48/69 *Imperial Chemical Industries Ltd v EC Commission* [1972] ECR 619, [1972] CMLR 557, ECJ.

3 The United States courts have ruled that whenever they have obtained jurisdiction over a party personally, it is possible to order the production of documents in his possession wherever the documents may be situated, provided their production is not contrary to their lex situs: *Re Investigation of World Arrangements with relation to the Production, Transporting, Refining and Distribution of Petroleum* 13 FRD 280 (1952), 19 Int LR 197. In that case, however, service of a subpoena for the production of documents upon the company concerned was set aside on the ground that the company was indistinguishable from the United Kingdom government and therefore entitled to sovereign immunity. For the letters to the company from the Minister of Fuel and Power and the Secretary of State for Foreign Affairs, forbidding the disclosure of the documents without the authority of the government, see the reports cited. The basis in English law for these instructions is unclear. In 1960 the United States Federal Maritime Commission made demands upon foreign shipping companies to produce documents relating to their activities, and objections to compliance where the documents were not in the United States were overruled: *Montship Lines Ltd v Federal Maritime Board* 295 F 2d 147 (1961). As to the views of the United Kingdom government on that case and the declarations made by 11 states, including the United Kingdom, see Lauterpacht's Contemporary Practice of the United Kingdom in the Field of International Law 1962 (I), 15-18; British Practice in International law 1963 (I), 13-14; British Practice in International Law 1964 (I), 36-37, 1964, (II), 146-157; British Practice in International Law 1965 (I), 30-31.

4 Clauses were inserted in some orders made by United States courts upon foreign corporations which had the effect of relieving them from compliance if their compliance would be unlawful under the law of a foreign state. See the cases cited in note 2. The extraterritorial application and enforcement of United States trade laws was met by 'blocking' legislation of other states. By the Shipping Contracts and Commercial Documents Act 1964 ss 1, 2 (both now repealed), the relevant Minister of the Crown was empowered to forbid the production to a foreign court or tribunal of documents in the United Kingdom in circumstances in which it appeared to him that the foreign court was asserting jurisdiction which by international law properly appertains to the United Kingdom: see **SHIPPING AND MARITIME LAW**. The Shipping Contracts and Commercial Documents Act 1964 was repealed and greater protection against exorbitant exercise of jurisdiction is now accorded by the Protection of Trading Interests Act 1980: see PARA 235. As to the need for such legislation see 973 HC Official Report (5th series), 15 November 1979, cols 1533-1546.

In 1991 an Agreement Regarding the Application of Competition Laws was reached between the European Commission and the United States, which provided for notification and co-ordination of such activities. However, the European Court of Justice held that it was ultra vires the Commission: Case C-327/91 *France v EC Commissio* [1994] ECR-I 3641, [1994] 5 CMLR 517, ECJ. The Agreement Regarding the Application of Competition Laws was reintroduced with rectification in EC Council and EC Commission Decision 95/45 (OJ L51, 8.3.1995, p 13). The Agreement Regarding the Application of Competition Laws does not deal with private actions in the United States courts.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/232. The exercise of judicial jurisdiction.

### **232. The exercise of judicial jurisdiction.**

Judicial jurisdiction is ordinarily dependent upon the presence of the defendant in the territory of the prosecuting state following his arrest within that territory. There may be circumstances where a court is able to proceed in the absence of the defendant, as trials in absentia are not, per se, contrary to international law. Human rights law, however, imposes some limitations on a state's power so to proceed<sup>1</sup>. Where the forum law requires the presence of the defendant, obtaining custody over him if he is not in the territory may depend upon the existence of extradition arrangements with the state where, for the time being, he is<sup>2</sup>. National legislation may allow for ad hoc transfer of a defendant to a foreign state for trial<sup>3</sup>. Informal transfers may be possible, and do not conflict with international law or human rights law<sup>4</sup>, but national law and the human rights obligations of the custody state may make an informal transfer difficult to achieve lawfully<sup>5</sup>.

1 See *Colozza v Italy* A 89 (1985), 7 EHRR 516, ECtHR; and Application 56581/00 *Sejdovic v Italy*, Judgment of 1 March 2006, ECtHR (Grand Chamber).

2 There is no obligation in customary international law on one state to transfer to another state a person wanted for trial there, and extradition arrangements are generally dependent upon treaties between the states involved: see generally **EXTRADITION** vol 17(2) (Reissue) PARA 1120 et seq.

3 See the Extradition Act 2003 ss 193, 194; and **EXTRADITION** vol 17(2) (Reissue) PARAS 1536, 1537. See also *Brown v Government of Rwanda* [2009] EWHC 770 (Admin), [2009] All ER (D) 98 (Apr).

4 *Ocalan v Turkey* (2005) 41 EHRR 985, [2005] ECHR 46221/99 at [87], [89].

5 *R v Horseferry Road Magistrates' Court ex p Bennett* [1994] 1 AC 42, sub nom *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, HL; *R v Mullen* [2000] QB 520, [1999] 2 Cr App Rep 143, CA.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(1) GENERAL PRINCIPLES/233. The seizure of persons in violation of international law.

### 233. The seizure of persons in violation of international law.

States may resort to the seizure of a suspect in the territory of another state, although such action without the consent of the local state is unlawful in international law and engages the responsibility of the intervening state<sup>1</sup>. However, it appears that obtaining custody in this way does not inevitably make any subsequent exercise of judicial jurisdiction unlawful<sup>2</sup>.

An individual does not derive rights of which he can claim benefit from the breach of sovereignty of another state<sup>3</sup>. However, the English court has allowed that the trial of an individual who has been returned to this country in oppressive circumstances involving UK officials may amount to an abuse of process, such that, in the court's discretion, the trial should not be permitted to proceed<sup>4</sup>. It has been suggested that where the officials have acted in breach of international law, this is a significant factor in persuading the court to exercise its discretion against proceeding with a trial<sup>5</sup>.

1 Eg, after the abduction of Eichmann from Argentina by agents of the state of Israel, Argentina requested on 15 June 1960 reparation in the form of the return of Eichmann and the punishment of those who had violated Argentine territory: see United Nations Doc S/4336. The Security Council of the United Nations resolved on 24 June 1960 that Israel should make appropriate reparation: see United Nations Doc S/4349. On 3 August 1960 the two states agreed to regard the incident as closed. See generally Fawcett 38 BYIL 181. Other examples include the abduction of Salomon from Switzerland by Nazi agents in 1936 and his subsequent return, and of Argoud from Germany by French agents in 1963. See also *Colunje Case* 6 RIAA 342 (1933). The seizing state may be under an obligation to return the person to the state from which he was abducted: see Lawler's Case 1 McNair's International Law Opinions 78; Martin's Case 1 McNair's International Law Opinions 79. For opinions to the effect that foreign authorities may not convey through British waters vessels or persons who have committed no wrong against British law, and that the British government could demand their release see Martin's Case at 80, 82. See also *Savarkar Case* Scott's Hague Reports 516 (1916).

2 This is true of English law (*Ex p Scott* (1829) 9 B & C 446, 3 BILC 1; *R v Officer Commanding Depot Battalion RASC Colchester, ex p Elliott* [1949] 1 All ER 373, 3 BILC 10), and of Scottish law (*Sinclair v Lord Advocate* (1890) 17 R (Ct of Sess) 38, 3 BILC 5). The same has been held in the United States (*Ker v Illinois* 119 US 436 (1886); *Ex p Lopez* 6 F Supp 342 (1934); and see *United States of America v Alvarez-Machain* 119 L Ed 2d 441 (1992)) and in the courts of Palestine (*Afounieh v A-G* (1941-42) 10 Ann Dig 327, Case no 97) and Israel (*A-G for the Government of Israel v Eichmann* (1961) 36 Int LR 5; cf the French case of *Re Jolis* (1933-34) 7 Ann Dig 191, Case no 77). In *Corfu Channel (United Kingdom v Albania)* ICJ Reports 1949, 4 the International Court of Justice admitted evidence which had been obtained by acts of the Royal Navy which the court had held to have been a violation of Albanian sovereignty.

3 Although the European Court of Human Rights has suggested that extraterritorial action by a party to the European Convention on Human Rights to seize an individual without the consent of the local state would breach art 5(1) (see *Ocalan v Turkey* [2005] ECHR 46221/99, 18 BHRC 293 at para 85; *Stocke v Germany* [1991] ECHR 11755/85, 13 EHRR 839 at para 167) it does not follow that human rights law protects an individual from trial in these circumstances, except, perhaps, where his abduction has involved a breach of his right not to be tortured or subjected to inhuman or degrading treatment (see *Bozano v Italy* (Application No 9991/82) (1984) 39 DR 147 (this decision might not stand after *Ocalan v Turkey*)).

4 *R v Horseferry Road Magistrates' Court ex p Bennett* [1994] 1 AC 42, sub nom *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, HL; *R v Mullen* [2000] QB 520, [1999] 2 Cr App Rep 143, CA.

5 *R v Horseferry Road Magistrates' Court ex p Bennett* [1994] 1 AC 42, sub nom *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, HL (although there was no breach of international law in that case). See also *R v Plymouth Justices, ex p Driver* [1986] QB 95, [1985] 2 All ER 681, DC; *R v Latif* [1996] 1 All ER 353, [1996] 1 WLR 104, HL; and *Re Schmidt* [1995] 1 AC 339, sub nom *Schmidt v Federal Government of Germany* [1994] 3 All ER 65, HL.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(2) PROTECTION OF TRADING INTERESTS/234. The Protection of Trading Interests Act 1980.

## **(2) PROTECTION OF TRADING INTERESTS**

### **234. The Protection of Trading Interests Act 1980.**

The Protection of Trading Interests Act 1980 provides protection from requirements, prohibitions or judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom<sup>1</sup>.

<sup>1</sup> Protection of Trading Interests Act 1980 preamble, s 8(1). See PARA 235 et seq. The Act extends to Northern Ireland: s 8(7). Her Majesty may by Order in Council direct that the Act extends with such exceptions, adaptations and modifications, if any, as may be specified in the order to any territory outside the United Kingdom, being a territory for the international relations of which Her Majesty's government in the United Kingdom are responsible: s 8(8). The Protection of Trading Interests Act 1980 applies with modifications to Guernsey (see the Protection of Trading Interests Act 1980 (Guernsey) Order 1983, SI 1983/1703), the Isle of Man (see the Protection of Trading Interests Act 1980 (Isle of Man) Order 1983, SI 1983/1704) and Jersey (see the Protection of Trading Interests Act 1980 (Jersey) Order 1983, SI 1983/607). As to the meaning of 'United Kingdom' see PARA 30 note 3.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(2) PROTECTION OF TRADING INTERESTS/235. Overseas measures affecting United Kingdom trading interests.

### **235. Overseas measures affecting United Kingdom trading interests.**

The Protection of Trading Interests Act 1980 provides protection from measures that have been or are proposed to be taken by or under the law of any overseas country for regulating or controlling international trade, which, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests<sup>1</sup> of the United Kingdom<sup>2</sup>. In such circumstances, the Secretary of State may by order direct that these provisions are to apply to those measures either generally or in their application to such cases as may be specified in the order<sup>3</sup>.

The Secretary of State may by order make provision for requiring, or enabling the Secretary of State to require, a person in the United Kingdom who carries on business there to give notice to the Secretary of State of any requirement or prohibition imposed or threatened to be imposed on that person pursuant to any measures in so far as these provisions apply<sup>4</sup> to them<sup>5</sup>. The Secretary of State may also give such a person such directions for prohibiting compliance with any such requirement or prohibition as he considers appropriate for avoiding damage to the trading interests<sup>6</sup> of the United Kingdom<sup>7</sup>.

Any person who without reasonable excuse fails to comply with any requirement to give notice, or knowingly contravenes directions given, is guilty of an offence<sup>8</sup>.

1 'Trade' includes any activity carried on in the course of a business of any description, and 'trading interests' is to be construed accordingly: Protection of Trading Interests Act 1980 s 1(6).

2 See the Protection of Trading Interests Act 1980 s 1(1), (3). Section 1(1), (3) (see the text and notes 3-8) are disapplied to the extent that EC Council Regulation 2271/96 (OJ L309, 22.11.96, p 1) (protecting against the effects of the extraterritorial application of legislation adopted by a third country) applies; and it is an offence to breach art 2 or art 5: Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya (Protection of Trading Interests) Order 1996, SI 1996/3171, art 3(1). As to the meaning of 'United Kingdom' see PARA 30 note 3.

3 Protection of Trading Interests Act 1980 s 1(1). The power of the Secretary of State to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 1(4). In exercise of this power the Secretary of State has made the following orders: the Protection of Trading Interests (US Re-export Control) Order 1982, SI 1982/885; the Protection of Trading Interests (US Antitrust Measures) Order 1983, SI 1983/900; and the Protection of Trading Interests (US Cuban Assets Control Regulations) Order 1992, SI 1992/2449. The effect of the Protection of Trading Interests (US Antitrust Measures) Order 1983, SI 1983/900, was judicially considered in *British Airways Board v Laker Airways Ltd* [1985] AC 58, [1984] 3 All ER 39, HL.

4 ie by virtue of an order under the Protection of Trading Interests Act 1980 s 1(1): s 1(2).

5 Protection of Trading Interests Act 1980 s 1(2).

6 See note 1.

7 Protection of Trading Interests Act 1980 s 1(3). See also note 2. Such directions may be either general or special and may prohibit compliance either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified: s 1(5). General directions are to be published in such manner as appears to the Secretary of State to be appropriate: s 1(5).

8 Protection of Trading Interests Act 1980 s 3(1). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: s 3(1). As to the statutory maximum see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140. Proceedings may

only be instituted by the Secretary of State, or with the consent of the Attorney General: s 3(3). Proceedings may be taken before the appropriate United Kingdom court having jurisdiction in the place where that person is for the time being: s 3(4). A person who is not a citizen of the United Kingdom and Colonies nor a body corporate incorporated in the United Kingdom is not guilty of an offence under s 3(1) by reason of any action taken outside the United Kingdom in contravention of directions under s 1(3): s 3(2).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(2) PROTECTION OF TRADING INTERESTS/236. Documents and information required by overseas courts and authorities.

### **236. Documents and information required by overseas courts and authorities.**

If it appears to him that either:

- 30 (1) a requirement has been or may be imposed<sup>1</sup> on a person or persons in the United Kingdom to produce to any court, tribunal or authority of an overseas country<sup>2</sup> any commercial document<sup>3</sup> which is not within the territorial jurisdiction of that country or to furnish any commercial information<sup>4</sup> to any such court, tribunal or authority<sup>5</sup>; or
- 31 (2) any such authority has imposed or may impose a requirement<sup>6</sup> on a person or persons in the United Kingdom to publish such document or information<sup>7</sup>,

the Secretary of State may give directions<sup>8</sup> for prohibiting compliance with the requirement, if it appears to him that the requirement is inadmissible<sup>9</sup>.

Any person who knowingly contravenes any such directions<sup>10</sup> is guilty of an offence<sup>11</sup>.

1 The making of a request or demand is to be treated as the imposition of a requirement if it is made in circumstances in which a requirement to the same effect could be or could have been imposed; and (1) any request or demand for the supply of a document or information which, pursuant to the requirement of any court, tribunal or authority of an overseas country, is addressed to a person in the United Kingdom; or (2) any requirement imposed by such a court, tribunal or authority to produce or furnish any document or information to a person specified in the requirement, is to be treated as a requirement to produce or furnish that document or information to that court, tribunal or authority: Protection of Trading Interests Act 1980 s 2(5). Section 2 is disapplied to the extent that EC Council Regulation 2271/96 (OJ 309, 22.11.96, p 1) (protecting against the effects of the extraterritorial application of legislation adopted by a third country) applies: Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996, SI 1996/3171, art 3(1). As to the meaning of 'United Kingdom' see PARA 30 note 3.

2 References to the law or a court, tribunal or authority of an overseas country include, in the case of a federal state, references to the law or a court, tribunal or authority of any constituent part of that country: Protection of Trading Interests Act 1980 s 8(3). 'Overseas country' means any country or territory outside the United Kingdom other than one for whose international relations Her Majesty's government in the United Kingdom are responsible: s 8(2).

3 'Commercial document' and 'commercial information' mean a document or information relating to a business of any description; and 'document' includes any record or device by means of which material is recorded or stored: Protection of Trading Interests Act 1980 s 2(6).

4 See note 3.

5 Protection of Trading Interests Act 1980 s 2(1)(a).

6 See note 1.

7 Protection of Trading Interests Act 1980 s 2(1)(b).

8 Directions may be either general or special and may prohibit compliance with any requirement either absolutely or in such cases or subject to specified conditions as to consent or otherwise as may be specified in the directions: Protection of Trading Interests Act 1980 s 2(4). General directions are to be published in such manner as appears appropriate to the Secretary of State: s 2(4).

9 Protection of Trading Interests Act 1980 s 2(1). A requirement is inadmissible if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom (s 2(2)(a)), or if

compliance with it would be prejudicial to the security of the United Kingdom or to the United Kingdom government's relations with any other country (s 2(2)(b)).

A requirement under s 2(1)(a) (see head (1) in the text) is also inadmissible if it is made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country (s 2(3)(a)) or if it requires a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement (s 2(3)(b)).

10     le directions under the Protection of Trading Interests Act 1980 s 2(1).

11     Protection of Trading Interests Act 1980 s 3(1). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: s 3(1). As to the statutory maximum see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140. No proceedings for such an offence are to be instituted in England, Wales or Northern Ireland except by the Secretary of State or with the consent of the Attorney General or, as the case may be, the Attorney General for Northern Ireland: s 3(3). Proceedings may be taken before the appropriate United Kingdom court having jurisdiction in the place where that person is for the time being: s 3(4). A person who is neither a citizen of the United Kingdom and Colonies nor a body corporate incorporated in the United Kingdom is not guilty of an offence under s 3(1) by reason of anything done or omitted outside the United Kingdom in contravention of directions under s 2(1): s 3(2).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(2) PROTECTION OF TRADING INTERESTS/237. Requests for evidence for proceedings in other jurisdictions.

**237. Requests for evidence for proceedings in other jurisdictions.**

A United Kingdom court may not make an order under the Evidence (Proceedings in Other Jurisdictions) Act 1975<sup>1</sup> for giving effect to a request issued by or on behalf of a court or tribunal of an overseas country<sup>2</sup> if it is shown that the request infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom<sup>3</sup>. A certificate signed by or on behalf of the Secretary of State to that effect is conclusive evidence that it infringes that jurisdiction or is so prejudicial<sup>4</sup>.

1     le under the Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2: see **CIVIL PROCEDURE** vol 11 (2009) PARA 1058.

2     As to references to courts and overseas tribunals see PARA 236 note 2.

3     Protection of Trading Interests Act 1980 s 4. As to the meaning of 'United Kingdom' see PARA 30 note 3.

4     Protection of Trading Interests Act 1980 s 4.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(2) PROTECTION OF TRADING INTERESTS/238. Restriction on enforcement of certain overseas judgments.

### 238. Restriction on enforcement of certain overseas judgments.

A judgment for multiple damages<sup>1</sup>, a judgment based on a provision or rule of law specified or described in an order<sup>2</sup>, and a judgment on a claim for contribution<sup>3</sup> in respect of damages awarded by either of the aforementioned judgments<sup>4</sup> may not be registered under Part II of the Administration of Justice Act 1920<sup>5</sup> or Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933<sup>6</sup>, and no United Kingdom court may entertain proceedings at common law for the recovery of any sum payable under such a judgment<sup>7</sup>.

1   Ie a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for loss or damage sustained by the person in whose favour the judgment is given: Protection of Trading Interests Act 1980 s 5(2)(a), (3). This applies to a judgment given before 20 March 1980 as well as to a judgment given on or after that date but s 5 does not affect any judgment which has been registered before that date under the Administration of Justice Act 1920 Pt II (ss 9-14) or the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7), or in respect of which such proceedings have been finally determined before that date: Protection of Trading Interests Act 1980 s 5(6). Note that the fact that part of a judgment is for multiple damages does not make the remainder of that judgment unenforceable: see *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch), [2009] IP & T 401; and *Lewis v Eliades* [2003] EWCA Civ 1758, [2004] 1 All ER 1196, [2004] 1 All ER (Comm) 545, [2004] 1 WLR 692.

2   Ie an order made by the Secretary of State in respect of any provision or rule of law which appears to him to be concerned with the prohibition or regulation of agreements, arrangements or practices designed to restrain, distort or restrict competition in the carrying on of business of any description or to be otherwise concerned with the promotion of such competition: Protection of Trading Interests Act 1980 s 5(2)(b), (4). The power of the Secretary of State to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 5(5). In exercise of this power, the Protection of Trading Interests (Australian Trade Practices) Order 1988, SI 1988/569, was made.

3   References to a claim for, or entitlement to, contribution are references to a claim or entitlement based on an enactment or rule of law: Protection of Trading Interests Act 1980 s 8(4).

4   Protection of Trading Interests Act 1980 s 5(2)(c).

5   Ie the Administration of Justice Act 1920 Pt II (ss 9-14): see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 166 et seq.

6   Ie the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7): see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 171 et seq.

7   Protection of Trading Interests Act 1980 s 5(1). The provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933 may, however, be applied by order. As to the meaning of 'United Kingdom' see PARA 30 note 3.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(2) PROTECTION OF TRADING INTERESTS/239. Recovery of awards for multiple damages.

### **239. Recovery of awards for multiple damages.**

Where a court of an overseas country has given a judgment for multiple damages<sup>1</sup> on or after 20 March 1980<sup>2</sup> against a qualifying defendant<sup>3</sup> and an amount on account of the damages has been paid<sup>4</sup> by the qualifying defendant either to the party in whose favour the judgment was given<sup>5</sup> or to another party who is entitled as against the qualifying defendant to contribution<sup>6</sup> in respect of damages<sup>7</sup>, the qualifying defendant is entitled to recover from the party in whose favour judgment was given so much of that amount as exceeds the part attributable to compensation<sup>8</sup>. A United Kingdom court may entertain proceedings brought by a person claiming to be so entitled notwithstanding that the person against whom the proceedings are brought is not within the jurisdiction<sup>9</sup>.

A qualifying defendant is also entitled to recover when an order is made by a tribunal or authority of an overseas country which would, if that tribunal or authority were a court, be a judgment for multiple damages<sup>10</sup>.

If it appears that the law of an overseas country provides or will provide for the enforcement in that country of judgments given under the above provisions relating to the recovery of multiple awards<sup>11</sup>, an Order in Council may be made providing for the enforcement in the United Kingdom of judgments of any description specified in the order which are given under any provision of the law of that country relating to the recovery of sums paid or obtained pursuant to a judgment for multiple damages<sup>12</sup>, whether or not that provision corresponds to the above provisions<sup>13</sup>.

1     le within the meaning of the Protection of Trading Interests Act 1980 s 5(3) (see PARA 238): s 6(1). Section 6 is disapplied to the extent that EC Council Regulation 2271/96 (OJ L309, 22.11.96, p 1) (protecting against the effects of the extraterritorial application of legislation adopted by a third country) applies; and it is an offence to breach art 2 or art 5: Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996, SI 1996/3171, art 3(2).

2     Protection of Trading Interests Act 1980 s 6(8).

3     'Qualifying defendant' means (1) a citizen of the United Kingdom and Colonies; (2) a body corporate incorporated in the United Kingdom or in a territory outside the United Kingdom for whose international relations the United Kingdom government is responsible; or (3) a person carrying on business in the United Kingdom: Protection of Trading Interests Act 1980 s 6(1). As to the meaning of 'United Kingdom' see PARA 30 note 3.

4     This includes an amount obtained by execution against the qualifying defendant's property or against the property of a company which directly or indirectly is wholly owned by him: Protection of Trading Interests Act 1980 s 6(6).

5     Or to any person in whom the rights of any such party have become vested by succession or assignment or otherwise: Protection of Trading Interests Act 1980 s 6(6).

6     This includes such a party's successors and assignees: Protection of Trading Interests Act 1980 s 6(6). As to references to 'contribution' see PARA 238 note 3.

7     Protection of Trading Interests Act 1980 s 6(1).

8     Protection of Trading Interests Act 1980 s 6(2). That part is taken to be such part as bears the same proportion to the whole of it as the sum assessed by the court that gave the judgment as compensation for the loss or damage sustained by the party in whose favour the judgment was given bears to the whole of the damages awarded to that party: s 6(2). However, this does not apply where the qualifying defendant is an



individual who was ordinarily resident in the overseas country at the time when the proceedings in which the judgment was given were instituted or a body corporate which had its principal place of business there at that time: s 6(3). Further, s 6(2) does not apply where the qualifying defendant carried on business in the overseas country and the proceedings in which the judgment was given were concerned with activities exclusively carried on in that country: s 6(4).

9 Protection of Trading Interests Act 1980 s 6(5).

10 Protection of Trading Interests Act 1980 s 6(7).

11 Ie under the Protection of Trading Interests Act 1980 s 6: see the text and notes 1-10.

12 See PARA 238 note 1.

13 Protection of Trading Interests Act 1980 s 7(1) (amended by the Civil Jurisdiction and Judgments Act 1982 s 38(1), (2)). As to the orders made see the Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994, SI 1994/1901.

Such an Order in Council may, as respects judgments to which it relates, make different provision for different descriptions of judgment and impose conditions or restrictions on the enforcement of judgments of any description: Protection of Trading Interests Act 1980 s 7(1A) (added by the Civil Jurisdiction and Judgments Act 1982 s 38(1), (3)). An order under the Protection of Trading Interests Act 1980 s 7 may apply, with or without modification, any of the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933: Protection of Trading Interests Act 1980 s 7(2). See **CONFLICT OF LAWS**.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(3) FOREIGN JURISDICTION/240. Jurisdiction over British subjects abroad.

### (3) FOREIGN JURISDICTION

#### 240. Jurisdiction over British subjects abroad.

In certain foreign countries<sup>1</sup>, and also in British protectorates<sup>2</sup>, the Crown has in the past acquired jurisdiction<sup>3</sup> over British subjects, and in some cases over foreigners, by treaty, capitulation, grant, usage, sufferance and other lawful means<sup>4</sup>; and where a foreign country is not subject to any government from whom the Crown might obtain jurisdiction in any of these ways, jurisdiction has been conferred upon the Crown by statute over British subjects for the time being resident in or resorting to that country<sup>5</sup>.

The jurisdiction so acquired or to be acquired in any foreign country may be held, exercised and enjoyed by the Crown in the same and as ample a manner as if acquired by the cession or conquest of territory<sup>6</sup>, and every act and thing done in pursuance of it is to be as valid as if it had been done according to the local law then in force in that foreign country<sup>7</sup>.

If, in any proceeding, civil or criminal, in a court in Her Majesty's dominions or held under the authority of Her Majesty, any question arises as to the existence or extent of any jurisdiction of Her Majesty in a foreign country, a Secretary of State must, on the application of the court, send to the court within a reasonable time his decision on the question<sup>8</sup>.

1 'Foreign country' means any country or place out of Her Majesty's dominions (Foreign Jurisdiction Act 1890 s 16), and in this context includes trust territories which were formerly administered under mandate of the League of Nations. The area within which this jurisdiction is exercised has probably now disappeared.

2 As to British protectorates and trust territories generally, and the jurisdiction there exercised by the Crown, see **COMMONWEALTH**.

3 'Jurisdiction' includes power: Foreign Jurisdiction Act 1890 s 16. The view that the protecting state cannot exercise jurisdiction over subjects of third states within the protectorate or protected state without the consent of that state seems to have been abandoned after 1890. It is implicit in the wording of s 1 that the United Kingdom may exercise such jurisdiction generally over foreigners in such territories: see the text to note 6; and the Report of the Law Officers of the Crown, 14 February 1895, 1 McNair's International Law Opinions 54. As to the meaning of 'United Kingdom' see PARA 30 note 3.

4 These are the modes of acquisition recited in the preamble to the Foreign Jurisdiction Act 1890.

5 Foreign Jurisdiction Act 1890 s 2. Note that the jurisdiction conferred is confined to British subjects. Section 2 would not, it seems, afford a valid argument by a foreigner in support of a plea of want of jurisdiction in a protectorate court, since foreign nations themselves have claimed and exercised jurisdiction over foreigners in their protectorates: see Hall's Foreign Jurisdiction 221 et seq.

6 Foreign Jurisdiction Act 1890 s 1. As to jurisdiction in ceded and conquered colonies see **COMMONWEALTH** vol 13 (2009) PARAS 803, 808. As to suspension of the royal prerogative while letters patent were in force and the rule that the Crown has no prerogative right to legislate in settlements see *Sammur v Strickland* [1938] AC 678, [1938] 3 All ER 693, 2 BILC 648, PC.

7 Foreign Jurisdiction Act 1890 s 3.

8 Foreign Jurisdiction Act 1890 s 4(1). The Secretary of State's decision is, for the purposes of the proceeding, final: s 4(1). The court must send to the Secretary of State, in a document under the seal of the court, or signed by a judge of the court, questions framed so as properly to raise the question, and sufficient answers to those questions are to be returned by the Secretary of State to the court, and those answers are conclusive evidence of the matters contained: s 4(2). As to the power to send a person charged with an offence cognisable in one of Her Majesty's courts in a foreign country for trial to a British possession see s 6. As to

execution of sentences see s 7. For the power of deportation of a British court in a foreign country see s 8. For the power to extend, by Order in Council, specified Acts to foreign countries in which the Crown has jurisdiction see s 5, Sch 1; and **COMMONWEALTH** vol 13 (2009) PARA 871.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/10. JURISDICTION/(3) FOREIGN JURISDICTION/241. Consular and other courts in foreign countries.

**241. Consular and other courts in foreign countries.**

The jurisdiction vested in the Crown<sup>1</sup> was exercised by means of courts established in foreign countries by Order in Council under statutory powers<sup>2</sup>. Such courts had in some cases permanent judges and assistant judges<sup>3</sup>, or were held by consuls-general, consuls or vice-consuls, according to the provisions of the various orders in force. In some cases an appellate jurisdiction was vested either in the court of some adjacent colony or in a supreme court specially constituted for some particular foreign territory, and in others the appeal lay direct to the Sovereign in Council. In some cases the laws obtaining in other portions of the Commonwealth were made applicable<sup>4</sup>.

1 See PARA 240.

2 These are conferred by the Foreign Jurisdiction Act 1890. Every Order in Council made in pursuance of the Foreign Jurisdiction Act 1890 is to be laid before both Houses of Parliament: s 11.

3 See eg the Bahrain Order 1959, SI 1959/1035 (spent).

4 Eg certain laws of India and the United Kingdom were made applicable in Bahrain: see the Bahrain Order 1959, SI 1959/1035 (spent).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(1) STATE IMMUNITY/242. State immunity under international law.

## 11. JURISDICTIONAL IMMUNITIES

### (1) STATE IMMUNITY

#### 242. State immunity under international law.

The law on state immunity is derived from rules of international law which limit the rights of the courts of one state to exercise authority over other states and their officials<sup>1</sup>. The rules stem from the basic principle of the sovereign equality of states and are designed to ensure that international relations can be properly and effectively conducted<sup>2</sup>. Their significance as a part of the international legal order has long been recognised by domestic courts<sup>3</sup> and has also been acknowledged by international courts and tribunals, including the European Court of Human Rights<sup>4</sup>. In 1972, the United Kingdom signed the European Convention on State Immunity<sup>5</sup>. More recently, the United Nations Convention on Jurisdictional Immunities of States and Their Property<sup>6</sup> was adopted by the UN General Assembly<sup>7</sup>.

<sup>1</sup> State immunity is not a self-imposed restriction on the jurisdiction of the courts but a limitation imposed from without: *Holland v Lampen-Wolfe* [2000] 3 All ER 833 at 847-848, [2000] 1 WLR 1573 at 1588, HL. See also *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270, [2007] 1 All ER 113 at [101].

<sup>2</sup> 1 *Oppenheim's International Law* (9th Edn, 1992) Vol 1 pp 341-343; Lady Fox *The Law of State Immunity* (2nd Edn, 2008) pp 57-59.

<sup>3</sup> See eg *Le Parlement Belge* (1880) 5 PD 197, CA; *The Schooner Exchange v Mcfaddon* 7 Cranch 116, US SC (1812); *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3) (Amnesty International intervening)* [2000] 1 AC 147 at 201, 268-269 [1999] 2 All ER 97 at 110, 169-170.

<sup>4</sup> *Al Adsani v United Kingdom* (ECHR Application 35753/97) (2002) 34 EHRR 273, 123 ILR 23; *Fogarty v United Kingdom* (ECHR Application 37112/97) (2001) 34 EHRR 302, 123 ILR 53; *McElhinney v Ireland and United Kingdom* (ECHR Application 31253/96) (2002) 34 EHRR 323, 123 ILR 73; *Kalogeropolou v Greece and Germany* (ECHR Application 0059021/00), 129 ILR 537.

<sup>5</sup> Basle 16 May 1972; TS 74 (1979); Cmnd 7742. The United Kingdom ratified this Convention and the International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships (Brussels 10 April 1926, with Protocol, Brussels 24 May 1934; TS 15 (1980); Cmnd 7800) after the enactment of the State Immunity Act 1978. The Convention has not achieved wide acceptance and has been ratified by only eight states: Austria (10 July 1975); Belgium (27 October 1975); Cyprus (10 March 1976); Germany (15 May 1990); Luxembourg (11 December 1986); the Netherlands (21 February 1985); Switzerland (6 July 1982) and the United Kingdom (3 July 1979). All except the UK have also ratified the Additional Protocol which came into force on 22 May 1985. For the history and structure of the Convention see Sir Iain Sinclair 'The European Convention on State Immunity' ICLQ 22 (1973) 254; and Lady Fox *The Law of State Immunity*, (2nd Edn, 2008) pp 187-193.

<sup>6</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004). The Convention is not yet in force, although 28 states, including the United Kingdom have signed it and the courts have already drawn upon its provisions in seeking to clarify the rules on state immunity: see *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270, [2007] 1 All ER 113; *Koo Golden East Mongolia v Bank of Nova Scotia* [2007] EWCA Civ 1443, [2008] QB 717, [2008] 2 All ER (Comm) 314; *AIG Capital Partners Inc v Republic of Kazakhstan (National Bank of Kazakhstan intervening)* [2005] EWHC 2239 (Comm) at [80], [2006] 1 All ER 284 at [80], [2006] 1 All ER (Comm) 1 at [80].

<sup>7</sup> United Nations General Assembly Resolution 59/38 of 16 December 2004.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(1) STATE IMMUNITY/243. State immunity at common law.

### **243. State immunity at common law.**

At common law, a foreign sovereign state and its head of state were entitled to claim immunity from the jurisdiction of the English courts in any action in which it was directly or indirectly impleaded. No distinction was drawn between actions which arose from the foreign state's official acts (*acta jure imperii*) and those which arose from its commercial activities (*acta jure gestionis*), as was the case under the law of many other states<sup>1</sup>. In 1972, the United Kingdom signed the European Convention on State Immunity<sup>2</sup>, which draws this distinction and confers immunity on the foreign state in respect of the former but not the latter, class of actions. Beginning in 1976, the English courts adhered to the distinction<sup>3</sup> and in the State Immunity Act 1978, which, subject to exceptions, replaces the rules of common law, the distinction between the two classes of case is drawn. However, in certain situations the Act does not apply<sup>4</sup> and another statute or the common law governs the immunity of the foreign states<sup>5</sup>.

<sup>1</sup> See eg *Thai-Europe Tapioca Service Ltd v Government of Pakistan* [1975] 3 All ER 961, [1975] 1 WLR 1485, CA.

<sup>2</sup> See PARA 242 note 5.

<sup>3</sup> See *Philippine Admiral (Owners) v Wallem Shipping (Hong Kong) Ltd* [1977] AC 373, [1976] 1 All ER 78, PC; *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, [1977] 1 All ER 881, CA; *Playa Larga (Owners of Cargo Lately Laden on Board) v I Congreso del Partido (Owners)* [1983] 1 AC 244, sub nom *I Congreso del Partido* [1981] 2 All ER 1064, HL.

<sup>4</sup> As to matters excluded from the operation of the State Immunity Act 1978 Pt I (ss 1-17) see s 16; and PARAS 259, 324.

<sup>5</sup> 'In the absence of statutory enactment, it is the common law including the incorporated rules of customary international law, which identifies and defines the extent of sovereign immunity': *Littrell v United States of America (No 2)* [1994] 4 All ER 203 at 210-211, [1995] 1 WLR 82 at 89, CA, per Rose LJ. See also *Holland v Lampen-Wolfe* [2000] 3 All ER 833, [2000] 1 WLR 1573, HL (affg [1999] 1 WLR 188, CA); and *Re AY Bank Ltd (in liquidation) v Bosnia and Herzegovina* [2006] EWHC 830 (Ch), [2006] 2 All ER (Comm) 463. For an illustration of the common law approach see the cases cited in note 3.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(2) STATE IMMUNITY UNDER THE STATE IMMUNITY ACT 1978/244. State immunity.

## **(2) STATE IMMUNITY UNDER THE**

### **244. State immunity.**

A state<sup>1</sup> is immune from the jurisdiction of the United Kingdom courts<sup>2</sup>, except as otherwise provided<sup>3</sup>. A court must give effect to the immunity conferred even though the state does not appear<sup>4</sup> in the proceedings in question<sup>5</sup>.

1 As to the meaning of 'state' see PARA 245.

2 'Court' includes any tribunal or body exercising judicial functions and a reference to the courts or law of the United Kingdom includes the courts or law of any part of the United Kingdom: State Immunity Act 1978 s 22(1). As to the meaning of 'United Kingdom' see PARA 30 note 3.

3 State Immunity Act 1978 s 1(1). See *Re P (Children Act: Diplomatic Immunity)* [1998] 1 FLR 624 (diplomatic agent and family ordered home by the United States government, his employer; claim against him subject to state immunity). For the exceptions from immunity see PARA 246 et seq. As to matters excluded from the scope of the State Immunity Act 1978, including criminal proceedings, see PARA 259.

4 References to entry of appearance, and judgment in default of appearance, include references to any corresponding procedures: State Immunity Act 1978 s 22(2). In proceedings in the United Kingdom, 'entry of appearance', in proceedings to which the CPR apply, has been replaced by acknowledgment of service. As to acknowledgment of service see CPR Pt 10. As to judgment in default of acknowledgment of service see CPR Pt 12. As to the proceedings to which the CPR do not apply see CPR 2.1. See further **CIVIL PROCEDURE**.

5 State Immunity Act 1978 s 1(2). See also *United Arab Emirates v Abdelghafar* [1995] ICR 65, [1995] IRLR 243; *Aziz v Bethnal Green City Challenge Co Ltd* [2000] IRLR 111, CA; *Caramba-Coker v Military Affairs Office of the Embassy of Kuwait* [2003] All ER (D) 186 (Apr), EAT.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(2) STATE IMMUNITY UNDER THE STATE IMMUNITY ACT 1978/245. Meaning of 'state'.

## 245. Meaning of 'state'.

The immunities and privileges conferred by the State Immunity Act 1978<sup>1</sup> apply to any foreign or Commonwealth state other than the United Kingdom<sup>2</sup>. A state includes (1) the sovereign or other head of that state in his public capacity; (2) the government of that state; and (3) any department of that government, but not an entity (a 'separate entity')<sup>3</sup> which is distinct from the executive organs of the government of the state and capable of suing or being sued<sup>4</sup>.

A certificate by or on behalf of the Secretary of State<sup>5</sup> is conclusive evidence on any question whether any country is a state, whether any territory is a constituent territory of a federal state for those purposes, or as to the person or persons to be regarded for those purposes as the head or government of a state<sup>6</sup>.

The State Immunity Act 1978 does not expressly provide for cases where an action is brought against the servants or agents of a foreign state, but there is authority that, in such cases, a state is entitled to claim immunity for its servants or agents as it could if it were sued itself<sup>7</sup>. A foreign state's entitlement to immunity cannot, therefore, be circumvented by suing its servants or agents<sup>8</sup>.

1 Immunities conferred by the State Immunity Act 1978 Pt I (ss 1-17).

2 State Immunity Act 1978 s 14(1). As to the meaning of 'United Kingdom' see PARA 30 note 3.

3 A separate entity is immune from United Kingdom jurisdiction only if (1) the proceedings relate to anything done by it in the exercise of sovereign authority; and (2) the circumstances are such that a state (or, in the case of proceedings to which the State Immunity Act 1978 s 10 applies, a state which is not a party to the Brussels Convention (see PARA 254)) would have been so immune: State Immunity Act 1978 s 14(2). Where the provisions of Pt I do not apply to a constituent territory by virtue of an order under s 14(5) (see note 4), s 14(2) applies to it as if it were a separate entity: s 14(6). See also *Kuwait Airways Corp v Iraqi Airways Co* [1995] 3 All ER 694, [1995] 1 WLR 1147, HL (in determining whether 'separate entity' has acted in the exercise of sovereign authority all the relevant circumstances must be taken into consideration. State-owned aircraft company not entitled to state immunity where acts not of a governmental nature, even though performed on direction of state); *Groot v De Nederlandsche Bank*; *Thornicroft v De Nederlandsche Bank* [2005] EWHC 2944 (QB), [2006] 1 All ER (Comm) 397, [2006] 1 WLR 3323 (central bank of the Netherlands capable of being separate entity); and *Pocket Kings Ltd v Safenames Ltd* [2009] EWHC 2529 (Ch), [2009] All ER (D) 205 (Oct).

4 State Immunity Act 1978 s 14(1). Part I may be extended to any constituent territory specified by order: s 14(5). See the State Immunity (Federal States) Order 1979, SI 1979/457; and the State Immunity (Federal States) Order 1993, SI 1993/2809.

The State Immunity Act 1978 may be extended to any British overseas territory: s 23(7) (amended by virtue of the British Overseas Territories Act 2002 s 1(2)). 'British overseas territory' means (1) any of the Channel Islands; (2) the Isle of Man; (3) any colony other than one for whose external relations a country other than the United Kingdom is responsible; or (4) any country or territory outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of the government of the United Kingdom: State Immunity Act 1978 s 22(4) (amended by virtue of the British Overseas Territories Act 2002 s 1(2)). See the State Immunity (Overseas Territories) Order 1979, SI 1979/458; the State Immunity (Guernsey) Order 1980, SI 1980/871; the State Immunity (Isle of Man) Order 1981, SI 1981/1112; and the State Immunity (Jersey) Order 1985, SI 1985/1642.

The European Union is not entitled to foreign sovereign immunity: *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 1 Ch 72 at 196-203, sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1988] 3 All ER 257 at 316-320, CA.

5 As to the Secretary of State see PARA 29.

6 State Immunity Act 1978 s 21(a).

7 *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26 at [10], [2007] 1 AC 270 at [10], [2007] 1 All ER 113 at [10]. The term 'government' as it appears in the State Immunity Act 1978 s 14(1) must be given a broad meaning and would include police functions as part of governmental activity: *Propend Finance Property Ltd v Sing* (1997) 111 ILR 611 at 669, Times 2 May, CA. A state's entitlement to immunity for the acts of its servants and agents does not require that they should have been acting in accordance with their instructions or authority. A state may claim immunity on behalf of such persons for any act for which it is, in international law responsible, save where an established exception applies: see *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* above at [12] and [74]-[78].

8 See note 7.

## **UPDATE**

### **245 Meaning of 'state'**

NOTE 4--A constituent territory of a federal state cannot itself be a 'state': *Pocket Kings Ltd v Safenames Ltd* [2009] EWHC 2529 (Ch), [2010] 2 WLR 1110, [2009] All ER (D) 205 (Oct).

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## 246. Submission to jurisdiction.

A state<sup>1</sup> is not immune from proceedings in respect of which it has submitted<sup>2</sup> to the jurisdiction of the United Kingdom courts<sup>3</sup>. A state may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement<sup>4</sup>.

A state is deemed to have submitted if (1) it has instituted the proceedings; or (2) it has intervened or taken any step in the proceedings<sup>5</sup>. However, head (2) above does not apply to: (a) intervention or any step taken for the purpose only of claiming immunity or asserting an interest in property in circumstances such that the state would have been entitled to immunity if the proceedings had been brought against it<sup>6</sup>; or (b) any step taken by the state in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable<sup>7</sup>.

1 As to the meaning of 'state' see PARA 245.

2 The head of a state's diplomatic mission in the United Kingdom, or the person performing his functions, is deemed to have authority to submit on behalf of the state in respect of any proceedings; any person who has entered into a contract on behalf of and with the authority of a state is deemed to have authority to submit on its behalf to proceedings arising out of the contract: State Immunity Act 1978 s 2(7). As to the meaning of 'United Kingdom' see PARA 30 note 3. The State Immunity Act 1978 requires an express submission to the jurisdiction of the courts. A failure to challenge an award made without jurisdiction would not in itself amount to an agreement in writing to submit the dispute to arbitration. However, where such submission has occurred it will remove a state's immunity in proceedings brought before the English courts for leave to enforce such an award whether the award was made in the United Kingdom or abroad. See *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2006] EWCA Civ 1529, [2007] QB 886, [2007] 1 All ER (Comm) 909 (affg [2005] EWHC 2437 (Comm) 1529, [2006] 1 All ER (Comm) 731); *Donegal International Ltd v Republic of Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep 397, [2007] All ER (D) 184 (Feb) (written submissions to the jurisdiction with regard to a compromise agreement amounted to waiver of immunity).

3 State Immunity Act 1978 s 2(1). As to the meaning of 'court' see PARA 244 note 2.

4 State Immunity Act 1978 s 2(2). However, a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission: s 2(2). 'Agreement' includes a treaty, convention or other international agreement: s 17(2). See also *Ahmed v Government of the Kingdom of Saudi Arabia* [1996] 2 All ER 248, [1996] ICR 25, CA (letter from state's solicitor to state's military attaché did not constitute prior written agreement between state and dismissed employee).

A submission in respect of any proceedings extends to any appeal but not to any counterclaim unless it arises out of the same legal relationship or facts as the claim: State Immunity Act 1978 s 2(6).

5 State Immunity Act 1978 s 2(3)(a), (b). See eg *London Branch of the Nigerian Universities Commission v Bastians* [1995] ICR 358, EAT (requirements of the Industrial Tribunals (Rules of Procedure) Regulations 1985, SI 1985/16, reg 3(1) (repealed: see now the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004/1861, reg 16(1), Sch 1 r 4) were not satisfied where a foreign state returned an uncompleted, undated and unsigned notice of appearance with an accompanying note, through the Foreign Office); *Arab Republic of Egypt v Gamal-Eldin* [1996] 2 All ER 237, [1996] ICR 13, EAT (no steps taken in proceedings where person who was not authorised to submit to jurisdiction on state's behalf wrote to industrial tribunal stating complainant's nationality). A member of a diplomatic mission or solicitors instructed by such a mission cannot take a step under the State Immunity Act 1978 s 2(3)(b) without the authority of the head of the mission or the person for the time being performing his functions: *Republic of Yemen v Aziz* [2005] EWCA Civ 745, [2005] ICR 1391, [2005] All ER (D) 188 (Jun).

6 State Immunity Act 1978 s 2(4). See *Caramba-Coker v Military Affairs Office of the Embassy of Kuwait* [2003] All ER (D) 186 (Apr), EAT (no submission to the jurisdiction will occur if the state disputing jurisdiction takes part in the proceedings solely for the purpose of securing a favourable finding on facts on which the question of jurisdiction depends).

7 State Immunity Act 1978 s 2(5).

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## **247. Commercial transactions and contracts to be performed in the United Kingdom.**

A state<sup>1</sup> is not immune from proceedings relating to: (1) a commercial transaction<sup>2</sup> entered into by the state<sup>3</sup>; or (2) an obligation of the state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom<sup>4</sup>, unless the parties to the dispute are states or have otherwise agreed in writing<sup>5</sup>.

The provisions described above do not apply to certain Admiralty proceedings<sup>6</sup>.

1 As to the meaning of 'state' see PARA 245.

2 'Commercial transaction' means (1) any contract for the supply of goods or services; (2) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (3) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority: State Immunity Act 1978 s 3(3). However, s 3(1) (see the text and notes 3-4) does not apply to a contract of employment between a state and an individual: s 3(3). In Pt I (ss 1-17), 'commercial purposes' means purposes of such transactions or activities as are mentioned in s 3(3): s 17(1).

See also *Planmount Ltd v Republic of Zaire* [1981] 1 All ER 1110, [1980] 2 Lloyd's Rep 393 (defence of sovereign immunity not available in action on contract for repair of ambassadorial residence); *Alcom Ltd v Republic of Colombia* [1984] AC 580, [1984] 2 All ER 6, HL (United Kingdom bank account maintained by embassy for daily running expenses of mission immune from proceedings enforcing embassy's judgment debt); *Koo Golden East Mongolia v Bank of Nova Scotia* [2007] EWCA Civ 1443, [2008] QB 717, [2008] 2 All ER (Comm) 314 (central bank regarded as 'separate entity' and enjoys same immunity from enforcement measures as the state itself).

3 State Immunity Act 1978 s 3(1)(a). See *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2002] EWCA Civ 1643, [2003] 2 Lloyd's Rep 571 (clause requiring state to submit to jurisdiction of English court construed under ordinary principles of construction for commercial contracts).

4 State Immunity Act 1978 s 3(1)(b). This does not apply if the contract (not being a commercial transaction) was made in the territory of the state concerned and the obligation in question is governed by its administrative law: s 3(2).

For these purposes, and the purposes of ss 4-8 (see PARAS 248-252), the territory of the United Kingdom is deemed to include any British overseas territory in respect of which the United Kingdom is a party to the European Convention on State Immunity (Basle, 16 May 1972; TS 74 (1979); Cmnd 7742): State Immunity Act 1978 ss 17(3), 22(3) (s 17(3) amended by virtue of the British Overseas Territories Act 2002 s 1(2)). Further, in the State Immunity Act 1978 ss 3(1), 4(1), 5, 16(2), references to the United Kingdom include reference to its territorial waters and any area designated under the Continental Shelf Act 1964 s 1(7) (see PARA 172): State Immunity Act 1978 s 17(4). As to the general statutory meaning of 'United Kingdom' see PARA 30 note 3. As to the meaning of 'British overseas territory' see PARA 245 note 4.

A certificate by or on behalf of the Secretary of State is conclusive evidence on any question whether a state is a party to the European Convention on State Immunity, whether it has made a declaration under art 24, or as to the territories in respect of which the United Kingdom or any other state is a party: State Immunity Act 1978 s 21(c). As to the Secretary of State see PARA 29.

5 State Immunity Act 1978 s 3(2).

6 See the State Immunity Act 1978 s 10(6); and PARA 254 note 1.

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## **248. Contracts of employment.**

A state<sup>1</sup> is not immune from proceedings relating to a contract of employment<sup>2</sup> between the state and an individual where the contract was made in the United Kingdom<sup>3</sup> or the work is to be wholly or partly performed there<sup>4</sup>.

Subject to exceptions<sup>5</sup>, this does not apply if: (1) when the proceedings are brought, the individual is a national of the state concerned<sup>6</sup>; or (2) when the contract was made the individual was neither a national of the United Kingdom<sup>7</sup> nor habitually resident there<sup>8</sup>; or (3) the parties to the contract have otherwise agreed in writing<sup>9</sup>. Further, the provisions described above do not apply to proceedings concerning the employment of the members of a diplomatic mission<sup>10</sup> or the members of a consular post<sup>11</sup>.

The provisions described above do not apply to certain Admiralty proceedings<sup>12</sup>.

1 As to the meaning of 'state' see PARA 245.

2 'Proceedings relating to a contract of employment' include proceedings between the parties to a contract of employment in respect of any statutory rights or duties to which they are entitled or subject as employer or employee: State Immunity Act 1978 s 4(6). See also *Sengupta v Republic of India* [1983] ICR 221, (1982) 126 Sol Jo 855, EAT.

3 As to the meaning of 'United Kingdom' for these purposes see PARA 247 note 4. As to the statutory meaning of 'United Kingdom' generally see PARA 30 note 3.

4 State Immunity Act 1978 s 4(1).

5 Where the work is for an office, agency or establishment maintained by the state in the United Kingdom for commercial purposes, heads (1) and (2) in the text do not exclude the application of the State Immunity Act 1978 s 4 unless the individual was habitually resident in that state when the contract was made: s 4(3). Head (3) in the text does not exclude the application of s 4 where the law of the United Kingdom requires the proceedings to be brought before a United Kingdom court: s 4(4). As to the meaning of 'court' see PARA 244 note 2. As to the meaning of 'commercial purposes' see PARA 247 note 2. See also *Arab Republic of Egypt v Gamal-Eldin* [1996] 2 All ER 237, [1996] ICR 13, EAT (state's medical office used to provide medical guidance, advice and expert care, not established for commercial purposes).

6 State Immunity Act 1978 s 4(2)(a).

7 'National of the United Kingdom' means a British citizen, a British overseas territories citizen, a British National (Overseas), a British Overseas citizen, a British subject or a British protected person: State Immunity Act 1978 s 4(5) (amended by the British Nationality Act 1981 s 52(6), Sch 7; the British Overseas Territories Act 2002 s 2(3); and SI 1986/948).

8 State Immunity Act 1978 s 4(2)(b). See *Arab Republic of Egypt v Gamal-Eldin* [1996] 2 All ER 237, [1996] ICR 13, EAT.

9 State Immunity Act 1978 s 4(2)(c).

10 Ie a mission within the meaning of the Diplomatic Privileges Act 1964 (see PARA 265 et seq). See also *Sengupta v Republic of India* [1983] ICR 221, EAT; *Ahmed v Government of the Kingdom of Saudi Arabia* [1996] 2 All ER 248, [1996] ICR 25, CA (a secretary employed in the administrative and technical services of a foreign embassy was a 'member of a mission' even though she was a British national who had been recruited in the United Kingdom); *Republic of Yemen v Aziz* [2005] EWCA Civ 745, [2005] ICR 1391, [2005] All ER (D) 188 (Jun); *Caramba-Coker v Military Affairs Office of the Embassy of Kuwait* [2003] All ER (D) 186 (Apr), EAT.

11 State Immunity Act 1978 s 16(1)(a). As to consular posts see PARA 290 et seq.

12 See the State Immunity Act 1978 s 10(6); and PARA 254 note 1.

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## **249. Personal injuries and damage to property.**

A state<sup>1</sup> is not immune from proceedings in respect of (1) death or personal injury; or (2) damage to or loss of tangible property, caused by an act or omission in the United Kingdom<sup>2</sup>.

There is no express requirement for the act or omission to be of a commercial or private law nature<sup>3</sup> provided it occurs within the United Kingdom. Where the alleged act or omission occurs abroad, however, the exception will not apply and the general immunity from jurisdiction in the State Immunity Act 1978<sup>4</sup> will apply so as to confer immunity upon the foreign state even though the acts alleged contravene the international prohibition against torture<sup>5</sup>.

1 As to the meaning of 'state' see PARA 245.

2 State Immunity Act 1978 s 5. As to the meaning of 'United Kingdom' for these purposes see PARA 247 note

4. As to the statutory meaning of 'United Kingdom' generally see PARA 30 note 3.

These provisions do not apply to certain Admiralty proceedings: see s 10(6); and PARA 254 note 1.

3 See *Letelier v Chile*, USA 488 F Supp 665 (1980), 63 ILR 378 (US Court rejected claim that torts exception in US Foreign Sovereign Immunities legislation referred only to private acts and held that it could apply to political assassination). Cf the position under common law: see *Holland v Lampen-Wolfe* [2000] 3 All ER 833, [2000] 1 WLR 1573, HL.

4 Ie under the State Immunity Act 1978 s 1; see PARA 244.

5 *Al Adsani v Government of Kuwait* (1996) Times, 29 March, CA; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2006] UKHL 26, [2007] 1 AC 270, [2007] 1 All ER 113.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(2) STATE IMMUNITY UNDER THE STATE IMMUNITY ACT 1978/250. Property.

## 250. Property.

A state<sup>1</sup> is not immune from proceedings relating to (1) any interest of the state in, or its possession or use of, immovable property in the United Kingdom<sup>2</sup>; or (2) any obligation of the state arising out of its interest in, or its possession or use of, any such property<sup>3</sup>. Neither is a state immune as respects proceedings relating to any interest of the state in moveable or immovable property, being an interest arising by way of succession, gift or bona vacantia<sup>4</sup>.

The fact that a state has or claims an interest in any property does not preclude any court<sup>5</sup> from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind, insolvency, the winding up of companies or the administration of trusts<sup>6</sup>.

In specified circumstances<sup>7</sup>, a court may entertain proceedings against a person other than a state notwithstanding that the proceedings relate to property which is in the possession or control of a state, or in which a state claims an interest<sup>8</sup>.

1 As to the meaning of 'state' see PARA 245.

2 State Immunity Act 1978 s 6(1)(a). As to the meaning of 'United Kingdom' for these purposes see PARA 247 note 4. As to the statutory meaning of 'United Kingdom' generally see PARA 30 note 3. Section 6(1) does not apply to proceedings concerning a state's title to or its possession of property used for the purposes of a diplomatic mission: s 16(1)(b). As to diplomatic missions see PARA 265 et seq. See *Intpro Properties (UK) Ltd v Sauve* [1983] QB 1019, [1983] 2 All ER 495, CA (private residence of diplomat (not head of mission) not included within the State Immunity Act 1978 s 16(1)(b) exclusion. Proceedings for breach of covenant not to be construed as 'proceedings concerning title or possession').

3 State Immunity Act 1978 s 6(1)(b).

4 State Immunity Act 1978 s 6(2). As to bona vacantia see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 235 et seq.

5 As to the meaning of 'court' see PARA 244 note 2.

6 State Immunity Act 1978 s 6(3). Thus a foreign state which is a creditor of an insolvent company cannot claim its debts in priority to other creditors: *Re Rafidain Bank* [1992] BCLC 301, [1992] BCC 376.

7 Ie (1) if the state would not have been immune had the proceedings been brought against it; or (2) in a case within the State Immunity Act 1978 s 6(1)(b) (see head (2) in the text), if the claim is neither admitted nor supported by prima facie evidence: s 6(4).

8 State Immunity Act 1978 s 6(4).

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## **251. Patents, trade-marks, etc.**

A state<sup>1</sup> is not immune from proceedings relating to (1) any patent, trade-mark, design or plant breeders' rights belonging to the state and registered or protected in the United Kingdom<sup>2</sup>, or for which the state has applied in the United Kingdom<sup>3</sup>; (2) an alleged infringement by the state in the United Kingdom of any patent, trade-mark, design, plant breeders' rights or copyright<sup>4</sup>; or (3) the right to use a trade or business name in the United Kingdom<sup>5</sup>.

1 As to the meaning of 'state' see PARA 245.

2 As to the meaning of 'United Kingdom' for these purposes see PARA 247 note 4. As to the statutory meaning of 'United Kingdom' generally see PARA 30 note 3.

3 State Immunity Act 1978 s 7(a).

4 State Immunity Act 1978 s 7(b). See *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1987] BCLC 667, Staughton J; *Gerber Products Co v Gerber Foods International Ltd* [2002] EWHC 428 (Ch), [2002] All ER (D) 264 (Mar).

5 State Immunity Act 1978 s 7(c).

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**252. Membership of bodies corporate etc.**

A state<sup>1</sup> is not immune from proceedings<sup>2</sup> relating to its membership of a body corporate, an unincorporated body or a partnership which (1) has members other than states<sup>3</sup>; and (2) is incorporated or constituted under the law of the United Kingdom or is controlled from or has its principal place of business in the United Kingdom<sup>4</sup>.

However, this does not apply if contrary provision has been made by a written agreement between the parties to a dispute or by the constitution or other instrument establishing or regulating the body or partnership in question<sup>5</sup>.

1 As to the meaning of 'state' see PARA 245.

2 I.e. proceedings between the state and the body or its other members or between the state and the other partners: State Immunity Act 1978 s 8(1).

3 State Immunity Act 1978 s 8(1)(a).

4 State Immunity Act 1978 s 8(1)(b). As to the meaning of 'United Kingdom' for these purposes see PARA 247 note 4. As to the statutory meaning of 'United Kingdom' generally see PARA 30 note 3.

5 State Immunity Act 1978 s 8(2).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(2) STATE IMMUNITY UNDER THE STATE IMMUNITY ACT 1978/253. Arbitrations.

### **253. Arbitrations.**

Where a state<sup>1</sup> has agreed in writing to submit a dispute which has arisen, or may arise to arbitration, it is not immune from proceedings in the United Kingdom<sup>2</sup> courts<sup>3</sup> which relate to the arbitration<sup>4</sup>. However, this is subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between states<sup>5</sup>.

1 As to the meaning of 'state' see PARA 245.

2 As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 As to the meaning of 'court' see PARA 244 note 2.

4 State Immunity Act 1978 s 9(1). See *Svenska v Petroleum Exploration AB v Government of the Republic of Lithuania* [2006] EWCA Civ 1529, [2007] QB 886, [2007] 1 All ER (Comm) 909 (if, on the overall construction of the transaction, the state is held to be bound by a written arbitration agreement, that will be sufficient to find that it had agreed in writing to refer the dispute to arbitration within the terms of the State Immunity Act 1978 s 9). There is no basis for construing s 9 as excluding proceedings relating to the enforcement of a foreign arbitral award: *Svenska v Petroleum Exploration AB v Government of the Republic of Lithuania*.

5 State Immunity Act 1978 s 9(2).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(2) STATE IMMUNITY UNDER THE STATE IMMUNITY ACT 1978/254. Ships used for commercial purposes.

## 254. Ships used for commercial purposes.

In the case of Admiralty proceedings and proceedings on any claim which could be made the subject of Admiralty proceedings<sup>1</sup>, a state<sup>2</sup> is not immune from (1) an action in rem against a ship<sup>3</sup> belonging to that state<sup>4</sup>; or (2) an action in personam for enforcing a claim in connection with such a ship, if, when the cause of action arose, the ship was in use or intended for use for commercial purposes<sup>5</sup>.

A state is not immune from (a) an action in rem against a cargo belonging to that state if both the cargo and ship carrying it were, when the cause of action arose, in use or intended for use for commercial purposes<sup>6</sup>; or (b) an action in personam for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use for commercial purposes<sup>7</sup>.

1 State Immunity Act 1978 s 10(1). As to Admiralty proceedings see **SHIPPING AND MARITIME LAW**. Sections 3-5 (see PARAS 247-249) do not apply to proceedings specified in s 10(1), if the state in question is a party to the Brussels Convention and the claim relates to the operation of a ship owned or operated by that state, the carriage of cargo or passengers on such a ship or the carriage of cargo owned by that state on any other ship: s 10(6). The Brussels Convention is the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships (Brussels, 10 April 1926, with Protocol, Brussels 24 May 1934; TS 15 (1980); Cmnd 7800): State Immunity Act 1978 s 17(1). A certificate by or on behalf of the Secretary of State is conclusive evidence on any question whether a state is a party to the Brussels Convention: State Immunity Act 1978 s 21(b). As to the Secretary of State see PARA 29.

2 As to the meaning of 'state' see PARA 245.

3 'Ship' includes hovercraft: State Immunity Act 1978 s 17(1). See also note 4.

4 State Immunity Act 1978 s 10(2)(a). Where an action in rem is brought against a ship belonging to a state for enforcing a claim in connection with another ship belonging to that state, s 10(2)(a) does not apply to the first ship unless both ships were in use or intended for use for commercial purposes when the cause of action relating to the other ship arose: s 10(3). As to the meaning of 'commercial purposes' see PARA 247 note 2.

References to a ship or cargo belonging to a state include a ship or cargo in its possession or control or in which it claims an interest, and subject to s 10(4) (see the text and notes 6-7) s 10(2) applies to property other than a ship as it applies to a ship: s 10(5).

5 State Immunity Act 1978 s 10(2)(b).

6 State Immunity Act 1978 s 10(4)(a).

7 State Immunity Act 1978 s 10(4)(b).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(2) STATE IMMUNITY UNDER THE STATE IMMUNITY ACT 1978/255. Value added tax, customs duties etc.

**255. Value added tax, customs duties etc.**

A state<sup>1</sup> is not immune from proceedings relating to its liability for (1) value added tax, any duty of customs or excise or any agricultural levy; or (2) rates in respect of premises occupied by it for commercial purposes<sup>2</sup>.

Other than in these respects, the provisions of Part I of the State Immunity Act 1978<sup>3</sup> do not apply to proceedings in respect of taxation<sup>4</sup>.

1 As to the meaning of 'state' see PARA 245.

2 State Immunity Act 1978 s 11. As to the meaning of 'commercial purposes' see PARA 247 note 2.

3 Ie the State Immunity Act 1978 Pt I (ss 1-17).

4 See PARA 259. See also *R v IRC, ex p Camacq Corpn* [1990] 1 All ER 173, [1990] 1 WLR 191, CA (proceedings relating to any tax not mentioned in the State Immunity Act 1978 s 11 are wholly outside the scope of Act, and the position rests on the common law).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(2) STATE IMMUNITY UNDER THE STATE IMMUNITY ACT 1978/256. Service of documents.

## 256. Service of documents.

Any writ<sup>1</sup> or other document required to be served for instituting proceedings against a state<sup>2</sup> must be served by being transmitted through the Foreign and Commonwealth Office to the state's ministry of foreign affairs and service is deemed to have been effected when the writ or document is received at that ministry<sup>3</sup>.

Any time for acknowledging service<sup>4</sup> (whether prescribed by rules of court or otherwise) begins to run two months after the date on which the writ or document is received at the ministry<sup>5</sup>. No judgment in default of acknowledgment of service<sup>6</sup> may be given against a state except on proof that the provisions regarding service<sup>7</sup> have been complied with and that the time for acknowledging service<sup>8</sup> has expired<sup>9</sup>.

A copy of any judgment given against a state in default of acknowledgment of service must be transmitted through the Foreign and Commonwealth Office to the state's ministry of foreign affairs; and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise)<sup>10</sup> begins to run two months after the date on which the copy of the judgment is received at the ministry<sup>11</sup>.

A certificate by, or on behalf of, the Secretary of State, is conclusive evidence on any question whether, and if so when, a document has been served or received as mentioned above<sup>12</sup>.

The provisions described above are not to be construed as applying to proceedings against a state by way of counterclaim or to an action in rem<sup>13</sup>.

1 Proceedings in the High Court or county court to which the CPR apply are now generally begun by claim form: see CPR Pt 7; and **CIVIL PROCEDURE** vol 11 (2009) PARA 116 et seq. As to the proceedings to which the CPR do not apply see CPR 2.1; and **COURTS** vol 10 (Reissue) PARA 575.

2 Proceedings against the constituent territories of a federal state are included: State Immunity Act 1978 s 14(5). As to the meaning of 'state' see PARA 245.

3 State Immunity Act 1978 s 12(1). A state which appears in proceedings cannot afterwards object that s 12(1) has not been complied with: s 12(3).

Section 12(1) does not prevent the service of a writ or other document in any manner which the state has agreed and s 12(2), (4) (see the text and notes 5, 9) does not apply to service in such a manner: s 12(6). Where s 12(6) applies and the state has agreed to a method of service other than through the Foreign and Commonwealth Office, the claim may be served either by the method agreed or in accordance with CPR 6.44: CPR 6.44(7).

The State Immunity Act 1978 s 12(1) must not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction: s 12(7). As to service of a claim form out of the jurisdiction where leave of the court is required see CPR 6.36. Where a claimant wishes to serve a claim form on a state, he must lodge in Central Office a request for service to be arranged by the Foreign and Commonwealth Office, a copy of the notice and, if the official language of the state is not English, a translation: see CPR 6.27, 6.28. Every such request for service must contain an undertaking by the person making the request (1) to be responsible for all expenses incurred by the Foreign and Commonwealth Office or foreign judicial authority; and (2) to pay those expenses to the Foreign and Commonwealth Office or foreign judicial authority on being informed of the amount: CPR 6.29.

4 As to acknowledgement of service see CPR Pt 10; and **CIVIL PROCEDURE** vol 11 (2009) PARA 184.

5 State Immunity Act 1978 s 12(2).

6 See CPR Pt 12; and **CIVIL PROCEDURE** vol 11 (2009) PARA 506 et seq.

7 le as contained in the State Immunity Act 1978 s 12(1): see the text and note 3. See also *Westminster City Council v Government of the Islamic Republic of Iran* [1986] 3 All ER 284, [1986] 1 WLR 979.

8 le as extended by the State Immunity Act 1978 s 12(2): see the text and note 5.

9 State Immunity Act 1978 s 12(4).

10 As to setting aside default judgments see CPR Pt 13; and **CIVIL PROCEDURE** vol 11 (2009) PARA 516.

11 State Immunity Act 1978 s 12(5). Where judgment has been obtained against a state in default of acknowledgment of service, it does not take effect until two months after service on the state of (1) a copy of the judgment; and (2) a copy of the evidence in support of the application for permission to enter default judgment (unless the evidence has already been served on the state): CPR 40.10.

12 State Immunity Act 1978 s 21(d). As to the Secretary of State see PARA 29.

13 State Immunity Act 1978 s 12(7).



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## 257. Other procedural privileges.

No penalty by way of committal or fine may be imposed in respect of any failure or refusal by or on behalf of a state<sup>1</sup> to disclose or produce any document or other information for the purposes of proceedings to which it is a party<sup>2</sup>.

Relief may not be given against a state by way of injunction or order for specific performance or for the recovery of land or other property<sup>3</sup>. The property of a state may not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale<sup>4</sup>. However, this does not prevent the giving of any relief or the issue of any process with the written consent<sup>5</sup> of the state concerned and any such consent (which may be contained in a prior agreement<sup>6</sup>) may be expressed so as to apply to a limited extent or generally<sup>7</sup>.

The provisions described above<sup>8</sup> apply to a separate entity<sup>9</sup> (not being a state's central bank or other monetary authority) which submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity<sup>10</sup>.

1 As to the meaning of 'state' see PARA 245.

2 State Immunity Act 1978 s 13(1).

3 State Immunity Act 1978 s 13(2)(a).

4 State Immunity Act 1978 s 13(2)(b). This does not prevent the issue of any process in respect of property used or intended for use for commercial purposes, but if s 10 does not apply (see PARA 254), s 13(2)(b) applies to property of a state party to the European Convention on State Immunity (ie the European Convention on State Immunity (Basle 16 May 1972; TS 74 (1979); Cmnd 7742)) only if (1) the process is for enforcing a judgment which is final within the meaning of the State Immunity Act 1978 s 18(1)(b) (see PARA 260 note 2) and the state has made a declaration under the European Convention on State Immunity art 24; or (2) the process is for enforcing an arbitration award: State Immunity Act 1978 s 13(4). See also note 5.

As to the meaning of 'commercial purposes' see PARA 247 note 2. Property of a state's central bank or other monetary authority must not be regarded for the purposes of the State Immunity Act 1978 s 13(4) as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity s 13(1)-(3) apply to it as if references to a state were references to the bank or authority: s 14(4). 'Property of a state's central bank or other monetary authority' means any asset in which the central bank has some kind of 'property' interest, which asset is allocated to or held in the name of a central bank, irrespective of the capacity in which the central bank holds it, or the purpose for which the property is held: *AIG Capital Partners Inc v Republic of Kazakhstan (National Bank of Kazakhstan intervening)* [2005] EWHC 2239 (Comm), [2006] 1 All ER 284, [2006] 1 All ER (Comm) 1 (cash and securities held abroad by third parties on behalf of central bank fell within the State Immunity Act 1978 s 4(4)). See also *Alcom Ltd v Republic of Colombia* [1984] AC 580 at 602, [1984] 2 All ER 6 at 11, HL, per Lord Diplock; and *AIC Ltd v Federal Republic of Nigeria* [2003] EWHC 1357 (QB) at [47], [2003] All ER (D) 190 (Jun). See further note 5.

5 The head of a state's diplomatic mission in the United Kingdom or the person performing his functions is deemed to have authority to give any such consent on behalf of the state: State Immunity Act 1978 s 13(5). For the purposes of s 13(4) (see note 4), the certificate of such person that any property is not used or intended for use by or on behalf of the state for commercial purposes is sufficient evidence of that fact unless the contrary is proved: s 13(5). As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

6 As to the meaning of 'agreement' see PARA 246 note 4.

7 State Immunity Act 1978 s 13(3). A provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent: s 13(3).

8     le the State Immunity Act 1978 s 13(1)-(3).

9     As to the meaning of 'separate entity' see PARA 245.

10    See the State Immunity Act 1978 s 14(3). Where the provisions of Pt I (ss 1-17) do not apply to a constituent territory by virtue of an order under s 14(5) (see PARA 245 note 4), s 14(2) applies to it as if it were a separate entity: s 14(6).

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## **258. Restriction and extension of immunities.**

If it appears that the immunities and privileges conferred on any state<sup>1</sup> (1) exceed those accorded by the law of that state in relation to the United Kingdom<sup>2</sup>; or (2) are less than those required by any treaty, convention or other international agreement to which that state and the United Kingdom are parties, provision may be made by Order in Council<sup>3</sup> restricting or extending those immunities and privileges to such extent as appears appropriate<sup>4</sup>.

1    le conferred by the State Immunity Act 1978 ss 1-13. As to the meaning of 'state' see PARA 245.

2    As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3    Any statutory instrument containing such an order is subject to annulment in pursuance of a resolution of either House of Parliament: State Immunity Act 1978 s 15(2).

4    State Immunity Act 1978 s 15(1). At the date at which this volume states the law, no Order in Council was in force under this provision extending or restricting immunities and privileges conferred on any state. See the State Immunity (Merchant Shipping) (Revocation) Order 1999, SI 1999/668, which revoked the State Immunity (Merchant Shipping) Order 1997, SI 1997/2591.

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## 259. Excluded matters.

Part I of the State Immunity Act 1978<sup>1</sup> does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968<sup>2</sup>. Nor does it apply to: (1) proceedings relating to anything done by or in relation to the armed forces of a state<sup>3</sup> while present in the United Kingdom<sup>4</sup>; (2) proceedings to which a specified provision of the Nuclear Installations Act 1965 applies<sup>5</sup>; (3) criminal proceedings<sup>6</sup>; or (4) proceedings relating to taxation<sup>7</sup>.

1    Ie the State Immunity Act 1978 Pt I (ss 1-17).

2    State Immunity Act 1978 s 16(1). Certain proceedings relating to interests in property are also excluded from the application of the State Immunity Act 1978: see s 16(1)(a), (b); and PARAS 248, 250.

3    As to the meaning of 'state' see PARA 245.

4    State Immunity Act 1978 s 16(2). In particular Pt I takes effect subject to the Visiting Forces Act 1952: see PARAS 324-326; and **ARMED FORCES**. As to the meaning of 'United Kingdom' for these purposes see PARA 247 note 4. As to the statutory meaning of 'United Kingdom' generally see PARA 30 note 3.

5    State Immunity Act 1978 s 16(3). The provision referred to is the Nuclear Installations Act 1965 s 17(6): see **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1507.

6    State Immunity Act 1978 s 16(4). As to the immunity from criminal proceedings afforded to diplomatic staff see PARA 274.

7    State Immunity Act 1978 s 16(5) (which excepts those proceedings mentioned in s 11; see PARA 255).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(2) STATE IMMUNITY UNDER THE STATE IMMUNITY ACT 1978/260. Recognition of judgments against the United Kingdom.

## **260. Recognition of judgments against the United Kingdom.**

Subject to exceptions<sup>1</sup>, certain judgments<sup>2</sup> given against the United Kingdom by a court in another state party to the European Convention on State Immunity<sup>3</sup> must be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in such proceedings<sup>4</sup>.

However, recognition need not be accorded in the case of a judgment if: (1) to do so would be manifestly contrary to public policy or if any party to the proceedings in which the judgment was given had no adequate opportunity to present his case<sup>5</sup>; or (2) the judgment was given without provisions regarding service<sup>6</sup> being complied with and the United Kingdom had not entered an appearance or applied to have the judgment set aside<sup>7</sup>.

Recognition of a judgment may also be refused:

- 32 (a) if proceedings between the same parties, based on the same facts and having the same purpose: (i) are pending before a court in the United Kingdom and were the first to be instituted; or (ii) are pending before a court in another state party to the Convention, were the first to be instituted and may result in a judgment to which the requirement for recognition will apply<sup>8</sup>;
- 33 (b) if the result of the judgment is inconsistent with the result of another judgment given in proceedings between the same parties and (i) the other judgment is by a court in the United Kingdom and either those proceedings were the first to be instituted or the judgment of that court was given before the first-mentioned judgment became final<sup>9</sup>; or (ii) the other judgment is by a court in another state party to the Convention and the requirement for recognition has already become applicable to it<sup>10</sup>;
- 34 (c) where the judgment was given against the United Kingdom in proceedings in respect of which the United Kingdom was not entitled to immunity by virtue of a provision corresponding to certain provisions exempting immunity in relation to immovable property<sup>11</sup>, if the court that gave the judgment (i) would not have had jurisdiction in the matter if it had applied rules of jurisdiction corresponding to those applicable to such matters in the United Kingdom; or (ii) applied a law other than that indicated by the United Kingdom rules of private international law and would have reached a different conclusion if it had applied the law so indicated<sup>12</sup>.

1 See the text and notes 5-12.

2 (1) a judgment (1) given in proceedings in which the United Kingdom was not entitled to immunity under provisions corresponding to the State Immunity Act 1978 ss 2-11 (see PARA 246 et seq); and (2) which is final, ie which is not or is no longer subject to appeal, or, if given in default of appearance, liable to be set aside: s 18(1) (a), (b). As to the meaning of 'appearance' see PARA 244 note 4. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 State Immunity Act 1978 s 18(1). References to a court in a state party to the European Convention on State Immunity (Basle, 16 May 1972; TS 74 (1979); Cmnd 7742) include a court in any territory in respect of which it is a party: State Immunity Act 1978 s 18(4). As to the meaning of 'court' see PARA 244 note 2.

4 State Immunity Act 1978 s 18(2). This also has effect in relation to any settlement entered into by the United Kingdom before a court in another state party to the European Convention on State Immunity which the

law of that state treats as equivalent to a judgment: State Immunity Act 1978 s 18(3). As to counterclaim generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 618 et seq.

5 State Immunity Act 1978 s 19(1)(a).

6 I.e. provisions corresponding to the State Immunity Act 1978 s 12 (see PARA 256).

7 State Immunity Act 1978 s 19(1)(b).

8 State Immunity Act 1978 s 19(2)(a). In this provision, and in the text and note 10, references to a court in the United Kingdom include references to a court in any British overseas territory in respect of which the United Kingdom is a party to the European Convention on State Immunity; and references to a court in another state party to the Convention include references to a court in any territory in respect of which it is a party: State Immunity Act 1978 s 19(4) (amended by the British Overseas Territories Act 2002 s 1(2)).

9 I.e. final within the meaning of the State Immunity Act 1978 s 18(1)(b) (see note 2).

10 State Immunity Act 1978 s 19(2)(b).

11 I.e. corresponding to the State Immunity Act 1978 s 6(2): see PARA 250.

12 State Immunity Act 1978 s 19(3).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(2) STATE IMMUNITY UNDER THE STATE IMMUNITY ACT 1978/261. Recognition and enforcement in the United Kingdom of foreign judgments against foreign states.

## **261. Recognition and enforcement in the United Kingdom of foreign judgments against foreign states.**

A judgment<sup>1</sup> given by a court of an overseas country against a state<sup>2</sup> other than the United Kingdom or the state to which that court belongs must be recognised and enforced in the United Kingdom<sup>3</sup> if, and only if: (1) it would be so recognised and enforced if it had not been given against a state<sup>4</sup>; (2) the court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with the State Immunity Act 1978<sup>5</sup>. Certain provisions of the State Immunity Act 1978 as to service of process and procedural privileges<sup>6</sup> apply to proceedings for the recognition or enforcement in the United Kingdom of a judgment given by a court of an overseas country (whether or not that judgment is within the provisions described above) as they apply to other proceedings<sup>7</sup>.

1    le any judgment or order (by whatever name called) given or made by a court in any civil proceedings: Civil Jurisdiction and Judgments Act 1982 s 50.

2    'A judgment given against a state' includes references to judgments of any of the following descriptions given in relation to a state: (1) judgments against the government, or a department of the government, of the state, but not judgments against an entity which is distinct from the executive organs; (2) judgments against the sovereign or head of state in his public capacity; (3) judgments against any such separate entity as is mentioned in head (1) given in proceedings relating to anything done by it in the exercise of the sovereign authority of the state: Civil Jurisdiction and Judgments Act 1982 s 31(2). A 'state', in the case of a federal state, includes any of its constituent territories: s 31(5).

3    Civil Jurisdiction and Judgments Act 1982 s 31(1). This does not affect recognition or enforcement in the United Kingdom of a judgment to which the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7) applies by virtue of the Carriage of Goods by Road Act 1965 s 4, the Nuclear Installations Act 1965 s 17(4), the Merchant Shipping Act 1995 s 166(4) or the Railways (Convention and International Carriage By Rail) Regulations 2005, SI 2005/2092: Civil Jurisdiction and Judgments Act 1982 s 31(3) (amended by the International Transport Conventions Act 1983 s 11(2); the Merchant Shipping Act 1995 s 314(2), Sch 13 para 66(a); Statute Law Repeals Act 2004; and SI 2005/2092). As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

4    Civil Jurisdiction and Judgments Act 1982 s 31(1)(a).

5    Civil Jurisdiction and Judgments Act 1982 s 31(1)(b). See the State Immunity Act 1978 ss 2-11; and PARA 246 et seq. See also *NML Capital Ltd v Republic of Argentina* [2010] EWCA Civ 41, 2010 All ER (D) 57 (Feb).

6    le the Civil Jurisdiction and Judgments Act 1982 ss 12, 13, 14(3), (4): see PARAS 256-257.

7    Civil Jurisdiction and Judgments Act 1982 s 31(4).

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### (3) THE FOREIGN STATE AS CLAIMANT

#### 262. Foreign state as claimant.

A foreign sovereign or state may be a claimant in proceedings in the English courts<sup>1</sup>. A foreign state need not sue in the name of the personal head of state<sup>2</sup>. When a foreign state sues in an English court it must comply with the procedural rules of the court<sup>3</sup>. Thus the foreign state may be required to furnish security for costs<sup>4</sup>, and it must make disclosure<sup>5</sup>.

1 *Hullelt and Widder v King of Spain* (1828) 2 Bli NS 31 at 53, 1 BILC 97, HL, applying *King of Spain v Pountes* (1618) Roll Abr, Court de Admiraltie (E3), 1 BILC 106n; *Emperor of Austria v Day and Kossuth* (1861) 3 De GF & J 217 at 238, 253, 1 BILC 45, CA. In *Barclay v Russell* (1797) 3 Ves 424 at 431, 2 BILC 207, Lord Loughborough had expressed doubts upon the point. For examples of actions instituted by foreign sovereigns see *King of Greece v Wright* (1837) 6 Dowl 12, 1 BILC 123; *Emperor of Brazil v Robinson* (1837) 6 Ad & El 801, 1 BILC 127; *King of the Two Sicilies v Willcox* (1851) 1 Sim NS 301, 2 BILC 230; *King of the Hellenes v Brostrom* (1923) 16 Ll L Rep 167 at 192, 2 BILC 128. However, the court will not determine a claim that amounts to the performance of an act of a sovereign character: *Mbasogo, President of the State of Equatorial Guinea v Logo Ltd* [2006] EWCA Civ 1370, [2007] QB 846, [2007] 2 WLR 1062 (tort claims made by a state were not justiciable in the English courts as they amounted to a claim for losses sustained in the exercise of a sovereign power to prevent an attempted coup). As to the position of unrecognised states see PARA 47. As to counterclaims against a claimant state see the State Immunity Act 1978 s 2(3)(a), (b); and PARA 243 et seq.

2 *United States of America v Prioleau* (1865) 35 LJ Ch 7, 1 BILC 129; *Prioleau v United States of America and Johnson* (1866) LR 2 Eq 659, 1 BILC 134; *United States of America v Wagner* (1867) 2 Ch App 582, 1 BILC 146 (revsg (1867) LR 3 Eq 724, 1 BILC 140); *Yzquierdo v Clydebank Engineering and Shipbuilding Co Ltd* [1902] AC 524, 1 BILC 183, HL (revsg (1901) 4 F (Ct of Sess) 319, 1 BILC 171). The envoy of a foreign state, however, does not represent his sovereign for the purpose of suing in his own name in respect of that sovereign's property: *Baron Penedo v Johnson* (1873) 29 LT 452, 1 BILC 157. See also *Republic of Liberia v Imperial Bank Ltd and Chinery* (1871) 25 LT 866, 1 BILC 153. In an action in respect of property alleged to belong to a foreign government, that government must be made a party to the action: *Schneider v Lizardi* (1845) 9 Beav 461, 6 BILC 775.

3 *King of Spain v Hullelt and Widder* (1833) 7 Bli NS 359 at 393, 1 BILC 111.

4 *King of Greece v Wright* (1837) 6 Dowl 12, 1 BILC 123; *Emperor of Brazil v Robinson* (1837) 5 Dowl 522, 1 BILC 127, distinguishing *Duke of Montellano v Christin* (1816) 5 M & S 503, 6 BILC 4, where security for costs against an ambassador who was not about to leave the jurisdiction was not ordered. See also *Republic of Costa Rica v Erlanger* (1876) 3 ChD 62, 1 BILC 167, CA.

5 *Rothschild v Queen of Portugal* (1839) 3 Y & C Ex 594, 1 BILC 128; *Prioleau v United States of America and Johnson* (1866) LR 2 Eq 659, 1 BILC 134; *United States of America v Wagner* (1867) 2 Ch App 582, 1 BILC 146, CA; *Republic of Costa Rica v Erlanger* (1874) LR 19 Eq 33, 1 BILC 159; *Republic of Peru v Weguelin* (1875) LR 20 Eq 140, 1 BILC 158; *South African Republic v Compagnie Franco-Belge du Chemin de Fer du Nord* [1898] 1 Ch 190, 3 BILC 536 (other proceedings [1897] 2 Ch 487, 3 BILC 531, CA). A defendant to an action brought by a foreign sovereign or state is entitled to an affidavit of documents: *Republic of Liberia v Imperial Bank* (1873) LR 16 Eq 179, 1 BILC 155; on appeal sub nom *Republic of Liberia v Roye* (1876) 1 App Cas 139, HL.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(4) HEADS OF STATE, HEADS OF GOVERNMENT, FOREIGN MINISTERS AND OTHER HIGH OFFICIALS/263. Privileges and immunities of heads of state etc.

#### **(4) HEADS OF STATE, HEADS OF GOVERNMENT, FOREIGN MINISTERS AND OTHER HIGH OFFICIALS**

##### **263. Privileges and immunities of heads of state etc.**

Subject to any necessary modifications, the Diplomatic Privileges Act 1964<sup>1</sup> applies to (1) a sovereign or other head of state<sup>2</sup>; (2) members of his family forming part of his household<sup>3</sup>; and (3) his private servants<sup>4</sup> as it applies to the head of a diplomatic mission, members of his family forming part of his household and his private servants<sup>5</sup>.

The position of a former head of state is, therefore, broadly comparable to that of a former head of a diplomatic mission as respects immunity for acts done while he was head of state in the exercise of his functions as such<sup>6</sup>. In addition to the personal inviolability enjoyed by a sovereign or other head of state, the authorities of the receiving state are obliged to treat him with due respect and take all appropriate steps to prevent any attack on his person, freedom or dignity<sup>7</sup>. Under rules of customary international law, holders of other high-ranking offices such as a head of government or a Minister for Foreign Affairs who, like a head of state, are recognised as representatives of the state solely by virtue of their office, enjoy similar immunities from jurisdiction<sup>8</sup>. In recent years, the courts have accepted that a Minister of Defence and a Minister of Commerce (including international trade) are entitled to immunity from criminal jurisdiction by virtue of their office<sup>9</sup>.

1 As to the Diplomatic Privileges Act 1964 generally see PARAS 265-289. As to the limits of immunity from civil proceedings under that Act see PARA 274.

2 State Immunity Act 1978 s 20(1)(a). This applies to the sovereign or other head of any state on whom immunities and privileges are conferred by Pt I (ss 1-17) (see s 14(1); and PARA 245); and is without prejudice to the application of Pt I to any such sovereign or head of state in his public capacity: s 20(5). Part I (see PARA 244 et seq) does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964: State Immunity Act 1978 s 16(1). A head of state, therefore, who does not enjoy immunity under the State Immunity Act 1978 may nevertheless enjoy the same immunity as a diplomatic agent under the Diplomatic Privileges Act 1964: *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Price Waterhouse* [1997] 4 All ER 108. The effect of these provisions is, inter alia, that immunity from criminal proceedings is conferred on heads of state in accordance with the Diplomatic Privileges Act 1964. See *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, sub nom *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening) (No 3)* [1999] 2 All ER 97, HL. See also *Re Mugabe* (7 January 2004, unreported), Bow Street Magistrates' Court (judgment reproduced in Warbrick 'Immunity and International Crimes in English Law' (2004) 53 ICLQ 769). As to certificates of the Secretary of State as to who is a head of state see PARA 245. As to the Secretary of State see PARA 29.

3 State Immunity Act 1978 s 20(1)(b). The immunities and privileges conferred by s 20(1)(a) are not subject to the restrictions by reference to nationality or residence contained in the Diplomatic Privileges Act 1964 Sch 1 arts 37 para 1, 38 (see PARAS 274-279); State Immunity Act 1978 s 20(2).

4 State Immunity Act 1978 s 20(1)(c). This provision reflects the view that, under customary international law, persons forming part of a head of state's retinue, accompanying him during his stay abroad, are entitled to the same privileges and immunities as the head of state himself. However, the retinue of a head of state may include persons whose status and functions go beyond those of private servants: see Oppenheim's International Law (9th Edn, 1992) Vol 1 p 1039. Section 20(1) (which applies only to heads of state, their families and private servants) may not, therefore, wholly cover those who accompany a head of state on visits abroad.

5 State Immunity Act 1978 s 20(1). See PARA 273 et seq. Subject to a contrary Direction by a Secretary of State, a person on whom immunities and privileges are conferred by s 20(1) is entitled to the exemption

conferred by the Immigration Act 1971 s 8(3) (see PARA 273); State Immunity Act 1978 s 20(3). Except as respects value added tax and customs and excise duty, s 20 does not affect any question whether a person is exempt from or immune as respects proceedings relating to taxation: s 20(4).

6 See *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, sub nom *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening) (No 3)* [1999] 2 All ER 97, HL. See also Satow's Diplomatic Practice (6th Edn, 2009) p 183.

7 Diplomatic Privileges Act 1964 Sch 1 art 29. See *Aziz v Aziz (Sultan of Brunei intervening)* [2007] EWCA Civ 712, [2008] 2 All ER 501, [2007] NLJR 1047 (application by ruling head of state to redact and anonymise references to himself and matters relating to a former marriage, in proceedings between his former wife and a third party, dismissed); Satow's Diplomatic Practice (6th Edn, 2009) p 183. See also *Harb v His Majesty King Fahd Bin Abdul Aziz* [2005] EWCA Civ 632, [2005] 2 FCR 342, [2005] 2 FLR 1108 (no breach of the Diplomatic Privileges Act 1964 Sch 1 art 29 by hearing of immunity issue in open court where sovereign challenge to maintenance application to be heard in private).

8 See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002, 3 (where the International Court of Justice upheld the personal immunity of an incumbent Minister for Foreign Affairs). For a detailed discussion of how the law has evolved see Watts 'The Legal Position in International Law of Heads of State, Heads of Governments and Foreign Ministers' *Hague Academy of International Law, Recueil des Cours* vol 247 (1994-III) pp 100-108. See also 1 Oppenheim's International Law (9th Edn, 1992) p 1033.

9 See *Re Mofaz* (12 February 2004), Bow Street Magistrates' Court, (2004) 128 ILR 713; *Re Bo Xilai* (8 November 2005), Bow Street Magistrates' Court, (2005) 128 ILR 713. See also the decision of Westminster Magistrate's Court, 29 September 2009 (unreported), upholding immunity from prosecution of Israeli Defence Minister Ehud Barak. The International Court of Justice (the 'ICJ') has itself noted that the conduct of government business with foreign states is no longer confined to Foreign Ministers and that 'with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it': see *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility)* ICJ Reports 2006, 6 (para 47).

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## **(5) SPECIAL MISSIONS**

### **264. Immunity of persons on special missions.**

International law does not lay down any clear rules as to the precise extent of the privileges and immunities to which persons on a special mission are entitled. It is, however, acknowledged that such missions do have a public, official character and that the members of such missions should, therefore, be entitled to special treatment<sup>1</sup>. The English courts have accordingly recognised that a representative of a foreign state on special mission may enjoy personal inviolability and immunity from jurisdiction comparable to that of a diplomatic agent<sup>2</sup>. Where there is a special agreement governing the terms of a special mission, recourse should be had to that agreement in order to determine the extent of the immunities conferred<sup>3</sup>. A Convention on Special Missions was adopted by the United Nations General Assembly in 1969<sup>4</sup>. It has not been widely ratified and there are conflicting views as to the extent to which it reflects existing customary international law. Unlike a permanent diplomatic mission within the terms of the Vienna Convention on Diplomatic Relations<sup>5</sup>, a special mission is a temporary ad hoc mission representing a state which is sent to another state for the purpose of dealing with it on specific questions or performing a specific task. Such a mission must have the consent of the receiving state<sup>6</sup>.

1 1 Oppenheim's International Law (9th Edn, 1992) pp 1125-1126. See also YILC 1967 vol II, 358.

2 *Re Bo Xilai*, 8 November 2005, Bow Street Magistrates' Court, 128 ILR 709, 713. See also *Tabatabai* case (Germany) (1983-86) 80 ILR 389; *Chong Boon Kim v Kim Yong Shik* (1964) 58 AJIL186; and *Kilroy v Windsor, Prince of Wales (USA)* (1978) ILR 81 at 605.

3 See *Fenton Textile Association v Krassin et al* (1921) 38 TLR 259, CA.

4 The UN Convention on Special Missions was adopted together with an Optional Protocol to the Convention on Special Missions concerning the Compulsory Settlement of Disputes (New York; 8 December 1969, Misc 3 (1970); Cmnd 4300). The Convention came into force in June 1985. Both Convention and Protocol have been signed by the United Kingdom but not ratified. See also Satow's Diplomatic Practice (6th Edn, 2009) pp 188-193.

5 Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565). See also PARA 265.

6 See UN Convention on Special Missions, arts 1(a), 2.

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## **(6) DIPLOMATIC PRIVILEGES AND IMMUNITIES**

### **265. The Vienna Convention on Diplomatic Relations.**

The United Kingdom is a party to the Vienna Convention on Diplomatic Relations<sup>1</sup>. Certain provisions of the Convention form part of the law of England by virtue of the Diplomatic Privileges Act 1964<sup>2</sup>. The Act applies to all diplomatic missions whether or not the sending state is a party to the Convention. It applies to all foreign and Commonwealth missions in the United Kingdom, but does not apply to consular officers or Commonwealth representatives of comparable status<sup>3</sup>, nor to international organisations and persons connected with them<sup>4</sup>. The Act also applies to sovereigns and other heads of state<sup>5</sup>.

1 The Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565). The Convention was adopted at the United Nations Conference on Diplomatic Intercourse and Immunities. It is not clear how far it was intended to be declaratory of customary international law. See 1 Oppenheim's International Law (9th Edn, 1992) pp 1070-1071. The conference also adopted an Optional Protocol concerning the Acquisition of Nationality (Vienna, 18 April 1961; Misc 6 (1961); Cmnd 1368), to which the United Kingdom is not a party; and an Optional Protocol concerning the Compulsory Settlement of Disputes (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565), to which the United Kingdom is a party. In 1969 the General Assembly adopted a Convention on Special Missions with an Optional Protocol concerning the Compulsory Settlement of Disputes (United Nations General Assembly, 8 December 1969; Misc 3 (1970); Cmnd 4300), which have been signed but not ratified by the United Kingdom (see PARA 264). As to the imperative nature in international law of the principles of diplomatic and consular immunity see *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran) (Provisional Measures)* ICJ Reports 1979, 7 at 19-20; *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3 at 42. As to the continued application of the Convention, notwithstanding the existence of a state of armed conflict between the states concerned see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005.

2 Diplomatic Privileges Act 1964 s 2(1), Sch 1. The provisions of the Vienna Convention on Diplomatic Relations there set out are arts 1, 22-24, 27-40, 45.

3 As to consular agents see the Consular Relations Act 1968; and PARA 290 et seq.

4 As to international organisations see the International Organisations Act 1968; and PARA 307 et seq.

5 See the State Immunity Act 1978 s 20; and PARA 263.

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## **266. In general.**

Those articles of the Vienna Convention on Diplomatic Relations<sup>1</sup> which are not included in the Diplomatic Privileges Act 1964<sup>2</sup> do not give rise to rights and duties directly enforceable in the domestic courts of the United Kingdom. According to these articles, the functions of a diplomatic mission consist inter alia in representing the sending state, protecting its interests and those of its nationals, negotiating with the receiving state, ascertaining conditions there and promoting friendly relations<sup>3</sup>. There are provisions concerning the appointment and accrediting of the head of the mission<sup>4</sup> and its staff, and the size of the mission<sup>5</sup>, the declaring of a member persona non grata<sup>6</sup>, the time at which the head of mission is considered to have taken up his functions<sup>7</sup> and the termination of those functions<sup>8</sup>.

1    I.e. the Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565).

2    See the Diplomatic Privileges Act 1964 Sch 1; and PARA 265 note 2.

3    Vienna Convention on Diplomatic Relations art 3 para 1. A diplomatic mission may perform consular functions (see PARA 292): art 3 para 2.

See *Propend Finance Property Ltd v Sing* (1997) 111 ILR 611, Times 2 May, CA (where court took a broad view of diplomatic functions to include police liaison functions). See also *Re P (Diplomatic Immunity; Jurisdiction)* [1998] 1 FLR 1026, CA.

4    'Head of the mission' means the person charged by the sending state with the duty of acting in that capacity: Vienna Convention on Diplomatic Relations art 1(a).

5    Vienna Convention on Diplomatic Relations arts 4-8, 10, 11. Without the prior express consent of the receiving state, the sending state may not establish an office forming part of the mission in localities other than those in which the mission itself is established: art 12.

6    Vienna Convention on Diplomatic Relations art 9.

7    Vienna Convention on Diplomatic Relations art 13.

8    Vienna Convention on Diplomatic Relations art 43. The receiving state must facilitate the departure of persons enjoying privileges and immunities, other than its own nationals, even in case of armed conflict: art 44. There are provisions concerning the representation of states in the case of breach of diplomatic relations (art 45) and for the temporary protection of interests of third states (art 46).

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## **267. Classes of heads of mission.**

The classes of heads of mission<sup>1</sup> established by the Vienna Convention on Diplomatic Relations<sup>2</sup> are (1) ambassadors or nuncios<sup>3</sup> accredited to heads of state and other heads of mission of equivalent rank; (2) envoys, ministers and internuncios<sup>4</sup> accredited to heads of state; and (3) chargés d'affaires accredited to ministers of foreign affairs<sup>5</sup>. Heads of mission enjoy precedence in their respective classes in order of the date and time of taking up their function<sup>6</sup>.

1 As to the meaning of 'head of the mission' see PARA 266 note 4.

2 The Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565). As to the provisions of the Convention given force of law in the United Kingdom see PARA 265 note 2.

3 'Ambassador' or 'nuncio' includes a High Commissioner accredited from one Commonwealth country to another. 'Nuncio' is the title given to a diplomatic representative of the Holy See having equivalent rank to an ambassador.

4 'Internuncio' is the title given to a diplomatic representative of the Holy See having equivalent rank to an envoy or minister.

5 Vienna Convention on Diplomatic Relations art 14 para 1. The only differentiation between these classes is concerned with precedence and etiquette: see art 14 para 2. The class to which heads of mission are to be assigned is as agreed between the sending and receiving states: art 15. As to the different classes of members of a mission for the purposes of privileges and immunities see PARAS 279-281.

6 Vienna Convention on Diplomatic Relations art 16 para 1. In practice this is upon presentation or receipt of credentials to or by the receiving state (art 15 para 1), although this provision is without prejudice to the practice of a receiving state regarding the precedence of the representative of the Holy See (art 16 para 3). Procedure for the reception of the heads of mission must be uniform in respect of members of the same class: art 18. The precedence of members of the staff of a mission must be notified by the head of the mission to the minister for foreign affairs: art 17. As to the performance of the functions of a head of mission who is absent or unable to act see art 19.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(6) DIPLOMATIC PRIVILEGES AND IMMUNITIES/268. Archives, correspondence, fees and charges.

## **268. Archives, correspondence, fees and charges.**

The archives and documents of the mission are inviolable at any time and wherever they may be<sup>1</sup>, and the United Kingdom must permit and protect free communication on the part of the mission for all official purposes<sup>2</sup>. The official correspondence of the mission is inviolable<sup>3</sup>: the diplomatic bag may not be opened or detained<sup>4</sup>, and the diplomatic courier must be protected in the United Kingdom in the performance of his functions<sup>5</sup>. He enjoys personal inviolability and is not liable to any form of arrest or detention<sup>6</sup>. The fees and charges levied by the diplomatic mission in the course of its official duties are exempt from all duties and taxes<sup>7</sup>.

1 Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 24. The embassy's internal documents are protected in an action for defamation by the defence of absolute privilege: *Fayed v Al-Tajir* [1988] QB 712, [1987] 2 All ER 396, CA. See also BYIL 58 (1987) pp 438-447. As to the meaning of 'inviolability' see *Shearson Lehman Brothers Inc v MacLaine Watson & Co Ltd (No 2)* [1988] 1 All ER 116, [1988] 1 WLR 16, HL (affinity assumed between immunity accorded to documents of an international organisation and that accorded to those of a diplomatic mission). See also PARA 309 note 4.

2 Diplomatic Privileges Act 1964 Sch 1 art 27 para 1. In communicating with the government and other missions of the sending state, the mission may employ all appropriate means including diplomatic couriers and messages in code and cipher, but the mission may only install and use a wireless transmitter with the consent of the United Kingdom: Sch 1 art 27 para 1. Third states must accord to official correspondence and other official communications in transit, including code or cipher messages, the same freedom and protection as is accorded by the United Kingdom: Sch 1 art 40 para 3. The same is true in the case of official communications whose presence in United Kingdom territory is due to force majeure: see Sch 1 art 40 para 4. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 Diplomatic Privileges Act 1964 Sch 1 art 27 para 2. 'Official correspondence' means all correspondence relating to the mission and its functions: Sch 1 art 27 para 2.

4 Diplomatic Privileges Act 1964 Sch 1 art 27 para 3. The packages constituting the diplomatic bag must bear visible external marks of their character and must contain only diplomatic correspondence or articles intended for diplomatic use: Sch 1 art 27 para 4. A diplomatic bag may be entrusted to the captain of a commercial aircraft, from whom a member of a mission may receive possession of the bag at its destination directly and freely: see Sch 1 art 27 para 7. The captain of such an aircraft is not, however, a diplomatic courier: Sch 1 art 27 para 7.

5 Diplomatic Privileges Act 1964 Sch 1 art 27 para 5. He must also be provided with an official document indicating his status and the number of packages constituting the diplomatic bag: Sch 1 art 27 para 5. The sending state or the diplomatic mission may designate a courier ad hoc, in which case Sch 1 art 27 para 5 applies to him except that the immunities cease to apply when he has delivered to the assignee the diplomatic bag in his charge: Sch 1 art 27 para 6. The United Kingdom must accord inviolability to diplomatic bags in transit as well as to couriers: see Sch 1 art 40 para 3. The same is true in the case of diplomatic couriers who have been granted a passport visa, if such visa was necessary, and official communications and diplomatic bags whose presence in United Kingdom territory is due to force majeure: see Sch 1 art 40 para 4.

6 Diplomatic Privileges Act 1964 Sch 1 art 27 para 5.

7 Diplomatic Privileges Act 1964 Sch 1 art 28.

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## 269. The mission's premises.

The premises of the diplomatic mission<sup>1</sup> are inviolable and may not be entered by the agents of the United Kingdom except with the consent of the head of the mission<sup>2</sup>. The United Kingdom is under a special duty to take all appropriate steps to protect them against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity<sup>3</sup>. The premises, their furnishings and other property and the mission's means of transport are immune from search, requisition, attachment or execution<sup>4</sup>. Embassy bank accounts which fund diplomatic activities in the receiving state are not held on mission premises and are, therefore, not directly covered by inviolability but the courts have established that such accounts cannot be made subject to attachment or execution<sup>5</sup>. The sending state and the head of mission are exempt from all national, regional or municipal dues and taxes in respect of the mission's premises, whether owned or leased, other than such as represent payment for specific services rendered<sup>6</sup>.

Under the Vienna Convention on Diplomatic Relations the receiving state must either facilitate the acquisition on its territory by the sending state of premises necessary for the mission or assist the mission to obtain accommodation in any other way<sup>7</sup>; and where necessary it must assist a mission in obtaining suitable accommodation for its members<sup>8</sup>. The sending state must not use the mission's premises in any manner incompatible with the functions<sup>9</sup> of the mission as laid down in the Convention, or by other rules of international law or by any special agreement between that state and the receiving state<sup>10</sup>.

1 'Premises of the mission' means the buildings or parts of buildings and the land ancillary to them, irrespective of ownership, used for the purposes of the mission, including the residence of the head of the mission: Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 1(i). The express reference to the residence of the head of mission has been held to exclude the residences of other members of the mission from the scope of such 'premises': see *Intpro Properties (UK) Ltd v Sauvel* [1983] QB 1019, [1983] 2 All ER 495. As to the meaning of 'head of the mission' see PARA 266 note 4. The mission has the right to display the sending state's flag and emblem on the premises: Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) art 20. Diplomatic immunity of a mission's premises applies only to premises currently in use; it is irrelevant that they were used for the mission's purposes in the past: *Westminster City Council v Government of the Islamic Republic of Iran* [1986] 3 All ER 284, [1986] 1 WLR 979. As to the acquisition and loss by land of diplomatic status see the Diplomatic and Consular Premises Act 1987; and PARA 270. As to the protection of diplomatic premises if diplomatic relations have been broken off or the mission in question is recalled see the Diplomatic Privileges Act 1964 Sch 1 art 45; and PARA 272. As to the provisions of the Vienna Convention on Diplomatic Relations given force of law in the United Kingdom see PARA 265 note 2.

2 Diplomatic Privileges Act 1964 Sch 1 art 22 para 1. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3. In 1896, Sun Yat Sen, who was then a political refugee, was found to be held hostage in the Chinese Legation in London. The court refused to issue a writ of habeas corpus: see McNair *International Law Opinions* (Oxford, 1956) Vol 1 p 85. The Diplomatic Privileges Act 1964 Sch 1 art 22 para 1 does not mean that the premises are extraterritorial in the sense that they form part of the territory of the sending state: see *Radwan v Radwan* [1973] Fam 24, [1972] 3 All ER 967 (where it was held that a divorce obtained in a foreign consulate in London was not an overseas divorce within the Recognition of Divorces and Legal Separations Act 1971 s 2 (repealed)). As to the recognition of foreign divorces see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 254 et seq. See also *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547, [1978] 1 All ER 434 (where the court held that witnesses, attending before a US judge hearing evidence in the US Embassy in London, had not thereby become subject to the jurisdiction of the US courts). As to the consular post see PARA 293.

Inviolability may also be claimed for the private residences of the members of the diplomatic and of the administrative and technical staff of the mission: see the Diplomatic Privileges Act 1964 Sch 1 arts 30 para 1, 37 para 2; and PARAS 273, 280. 'Members of the diplomatic staff' means members of the staff of the mission having diplomatic rank; and 'members of the administrative and technical staff' means the members of the staff



of the mission employed in the administrative and technical service of the mission: Sch 1 art 1(d), (f). Schedule 1 has effect as if references to the members of the administrative and technical staff of a mission included references to persons designated as auxiliary personnel for an inspection carried out under the Stockholm Document and performing administrative and technical services: Arms Control and Disarmament (Privileges and Immunities) Act 1988 s 1(1)(b). As to the Stockholm document, and the extension of privileges in connection therewith, see PARA 273 note 1.

3 Diplomatic Privileges Act 1964 Sch 1 art 22 para 2. For a discussion of the receiving state's duty to protect mission premises see *Minister for Foreign Affairs and Trade v Magno* (1992-3) 112 ALR 529, (1992) 101 ILR 202. See also *Aziz v Aziz (Sultan of Brunei intervening)* [2007] EWCA Civ 712, [2008] 2 All ER 501, [2007] NLJR 1047. For the purposes of the rule that conspiracy to commit trespass is an indictable offence if committed in the public domain, a foreign embassy or High Commission is part of the public domain: *Kamara v DPP* [1974] AC 104, [1973] 2 All ER 1242, HL.

4 Diplomatic Privileges Act 1964 Sch 1 art 22 para 3. The same appears to apply to the service of a writ within the diplomatic premises. Personal service of legal process within the premises or at the door is prohibited: see *Adams v DPP, Judge for District No 16, Her Majesty's Secretary of State for Home Affairs, Ireland* [2001] 1 IR 47, [2001] 2 ILRM 401 (Irish court held that service of proceedings on British Ambassador to Ireland was illegal under art 22 of the Vienna Convention on Diplomatic Relations). It is also generally accepted that service by post on inviolable premises is a breach of such inviolability and therefore ineffective: see Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (3rd Edn, 2008) pp 151-153. As to the requirement that proceedings against a state must be transmitted through the diplomatic channel to the Ministry of Foreign Affairs of the defendant state see the State Immunity Act 1978 s 12(1); and PARA 256.

5 See *Alcom Ltd v Republic of Colombia* [1984] AC 580, [1984] 2 All ER 6; and *Liberian Eastern Timber Corp v Government of Liberia* ICSID Case No ARB/83/2, (1992) 89 ILR 360.

6 Diplomatic Privileges Act 1964 Sch 1 art 23 para 1. This exemption does not apply to such dues and taxes payable under the law of the United Kingdom by persons contracting with the sending state or the head of mission (eg rates payable by a lessor of premises leased by the sending state for use as premises of the mission): Sch 1 art 23 para 2. See also PARA 275 text to note 7.

7 Vienna Convention on Diplomatic Relations art 21 para 1. This includes the residence of the head of the mission: see note 1.

8 Vienna Convention on Diplomatic Relations art 21 para 2.

9 For the functions of a diplomatic mission see the Vienna Convention on Diplomatic Relations art 3; and PARA 266.

10 Vienna Convention on Diplomatic Relations art 41 para 3.

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## **270. Acquisition and loss by land of diplomatic or consular status.**

Where a state desires that land<sup>1</sup> should be diplomatic or consular premises<sup>2</sup>, it must apply to the Secretary of State<sup>3</sup> for his consent to the land being such premises<sup>4</sup>. Unless he has given such consent<sup>5</sup>, land is in no case to be regarded as a state's diplomatic or consular premises for the purposes of any enactment or rule of law<sup>6</sup>. If a state ceases to use land for the purposes of its mission or exclusively for the purposes of a consular post, or if the Secretary of State withdraws his consent<sup>7</sup>, the land ceases to be diplomatic or consular premises for the purposes of all enactments and rules of law<sup>8</sup>. If a state intends to cease using land as premises of its mission or as consular premises, it must give the Secretary of State notice of that intention, specifying the date on which it intends to cease so using them<sup>9</sup>.

In any proceedings a certificate issued by or under the authority of the Secretary of State stating any fact relevant to the question whether or not land was at any time diplomatic or consular premises is conclusive of that fact<sup>10</sup>.

1 'Land' includes buildings and other structures, land covered with water and any estate, interest, easement, servitude or right in or over land: Diplomatic and Consular Premises Act 1987 s 5 (amended by the Land Registration Act 2002 Sch 11 para 21(2)).

2 'Diplomatic premises' means premises of the mission of a state: Diplomatic and Consular Premises Act 1987 s 5. 'Consular premises' has the meaning given by the definitions in the Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219) art 1 para 1(a), (j), as it has effect in the United Kingdom by virtue of the Consular Relations Act 1968 s 1, Sch 1 (see PARA 290 et seq): Diplomatic and Consular Premises Act 1987 s 5.

3 As to the Secretary of State see PARA 29.

4 Diplomatic and Consular Premises Act 1987 s 1(1). A state need not make such an application in relation to land if the Secretary of State accepted it as diplomatic or consular premises immediately before 1 January 1988: ss 1(2), 9(2); Diplomatic and Consular Premises Act 1987 (Commencement No 2) Order 1987, SI 1987/2248.

5 Or unless he has accepted the land as diplomatic or consular premises under the Diplomatic and Consular Premises Act 1987 s 1(2) (see note 4): see s 1(3).

6 Diplomatic and Consular Premises Act 1987 s 1(3).

7 Or his acceptance under the Diplomatic and Consular Premises Act 1987 s 1(2) (see note 4).

8 Diplomatic and Consular Premises Act 1987 s 1(3). The Secretary of State may only give or withdraw consent or withdraw acceptance if he is satisfied that to do so is permissible under international law: s 1(4). In determining whether to do so he must have regard to all material considerations, and in particular, but without prejudice to the generality of this requirement: (1) to the safety of the public; (2) to national security; and (3) to town and country planning: s 1(5).

9 Diplomatic and Consular Premises Act 1987 s 1(6). 'Premises of the mission' has the meaning given by the Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) art 1(i), as it has effect in the United Kingdom by virtue of the Diplomatic Privileges Act 1964 s 2, Sch 1 (see PARA 269 note 1): Diplomatic and Consular Premises Act 1987 s 5.

10 Diplomatic and Consular Premises Act 1987 s 1(7).

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## **271. Vesting of former diplomatic or consular premises in the Secretary of State.**

In the case of former diplomatic or consular premises<sup>1</sup>, the Secretary of State may by order<sup>2</sup> provide that the following provisions are to apply to the land in question<sup>3</sup>. He may by deed poll vest in himself such estate or interest in the land as appears to him to be appropriate<sup>4</sup>.

Where circumstances have arisen in consequence of which the power to make an order is exercisable, but the Secretary of State serves on the owner of the land in relation to which it has become exercisable notice that he does not intend to exercise the power in relation to that land, it ceases to be exercisable in relation to it in consequence of those circumstances<sup>5</sup>. If the Secretary of State has exercised the power to make an order in relation to land, but serves on the owner notice that he does not intend to execute a deed poll as described above relating to the land, the power to vest ceases to be exercisable<sup>6</sup>.

Where an estate or interest in land has vested in the Secretary of State under the provisions described above, it is his duty to sell it as soon as it is reasonably practicable to do so, taking all reasonable steps to ensure that the price is the best that can reasonably be obtained<sup>7</sup>. He must apply the purchase money firstly in payment of expenses properly incurred by him as incidental to the sale or any attempted sale<sup>8</sup>; secondly in discharge of prior incumbrances to which the sale is not made subject or in the making of any required<sup>9</sup> payments to mortgagees<sup>10</sup>; thirdly in payment of expenses relating to the land reasonably incurred by him on repairs or security<sup>11</sup>; fourthly in discharge of such liabilities to pay rates or sums in lieu of rates on the land or on any other land as the Secretary of State thinks fit<sup>12</sup>; and fifthly in discharge of such judgment debts arising out of matters relating to the land or to any other land as he thinks fit<sup>13</sup>. He must pay any residue to the person divested of the estate or interest<sup>14</sup>.

1    le where (1) the Secretary of State formerly accepted land as diplomatic or consular premises but did not accept it as such premises immediately before 1 January 1988 (ie the date of the coming into force of the Diplomatic and Consular Premises Act 1987 s 2: Diplomatic and Consular Premises Act 1987 (Commencement No 2) Order 1987, SI 1987/2248); or (2) land has ceased to be diplomatic or consular premises after the coming into force of the Diplomatic and Consular Premises Act 1987 s 2 but not less than 12 months before the exercise of the power conferred on the Secretary of State by s 2: s 2(1)(a), (b). As to the meanings of 'diplomatic premises' and 'consular premises' see PARA 270 note 2. As to the Secretary of State see PARA 29.

2    Such an order must be made by statutory instrument, and a statutory instrument containing any such order is subject to annulment in pursuance of a resolution of either House of Parliament: Diplomatic and Consular Premises Act 1987 s 2(4). At the date at which this volume states the law, the Diplomatic and Consular Premises (Cambodia) Order 1988, SI 1988/30, had been made under this provision.

3    Diplomatic and Consular Premises Act 1987 s 2(1). He may only exercise this power if he is satisfied that to do so is permissible under international law: s 2(2). In determining whether to exercise it he must have regard to all material considerations, and in particular, but without prejudice to the generality of this requirement, to any of the considerations mentioned in s 1(5) (see PARA 270 note 8) that appears to him to be relevant: s 2(3). See *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Samuel* (1989) 83 ILR 232, CA. See also associated proceedings in *Westminster City Council v Tomlin* [1990] 1 All ER 920, [1989] 1 WLR 1287.

4    Diplomatic and Consular Premises Act 1987 s 2(5). Such a deed poll may also comprise any portion of a building in which the former diplomatic or consular premises are situated: s 2(6).

In a case falling within s 2(1)(a) (see head (1) in note 1), the Secretary of State might only exercise the power conferred by s 2(1) before the end of the period of two months beginning with the 1 January 1988: see s 2(8). However, the power continues to be exercisable after the end of that period if within that period he (1) certified that he reserves the right to exercise it; and (2) unless he considers it inappropriate or impracticable to do so, serves a copy of the certificate on the owner of any estate or interest in the land: s 2(9).

A deed poll has effect to vest in the Secretary of State the benefit of any covenant touching and concerning the land to which the deed relates but not annexed to it if, immediately before the vesting of the estate to which the deed relates, the covenant was enforceable by the person divested of that estate: s 4, Sch 1 para 3. Where a term of years has vested in the Secretary of State, and assignment of the term is absolutely prohibited, the prohibition must be treated, in relation to an assignment on sale, as if it were a provision to the effect that the term may not be assigned without the consent of the landlord and that such consent is not to be unreasonably withheld: Sch 1 para 4.

Further provision is made for the machinery to give effect, in terms of land law, to the transactions under s 2: see Sch 1 para 5 (registered land), Sch 1 paras 6, 7 (unregistered land), Sch 1 para 8 (production of title).

5 Diplomatic and Consular Premises Act 1987 s 2(10).

6 Diplomatic and Consular Premises Act 1987 s 2(11).

7 Diplomatic and Consular Premises Act 1987 s 3(1).

8 Diplomatic and Consular Premises Act 1987 s 3(2)(a).

9 le required by the Diplomatic and Consular Premises Act 1987 Sch 1: s 3(2)(b).

10 Diplomatic and Consular Premises Act 1987 s 3(2)(b). 'Mortgage' includes a charge or lien for securing money or money's worth; and 'mortgagees' falls to be construed accordingly: s 5.

11 Diplomatic and Consular Premises Act 1987 s 3(2)(c).

12 Diplomatic and Consular Premises Act 1987 s 3(2)(d).

13 Diplomatic and Consular Premises Act 1987 s 3(2)(e).

14 Diplomatic and Consular Premises Act 1987 s 3(2). Where a state was divested but there is no person with whom Her Majesty's government of the United Kingdom has dealings as the government of that state, the Secretary of State must hold the residue until there is such a person and then pay it: s 3(3). A sum so held must be placed in a bank account bearing interest at such rate as the Treasury may approve: s 3(4). As to the statutory meaning of 'United Kingdom' see PARA 30 note 3. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(6) DIPLOMATIC PRIVILEGES AND IMMUNITIES/272. Status of diplomatic premises if relations broken off or mission recalled.

**272. Status of diplomatic premises if relations broken off or mission recalled.**

If diplomatic relations are broken off between two states, or if a mission is permanently or temporarily recalled, the following provisions apply<sup>1</sup>. The United Kingdom must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives<sup>2</sup>. The sending state may entrust the custody of the premises of the mission, together with its property and archives, to a third state acceptable to the United Kingdom<sup>3</sup>. The sending state may also entrust the protection of its interests and those of its nationals to a third state acceptable to the United Kingdom<sup>4</sup>.

1 Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 45 (added by the Diplomatic and Consular Premises Act 1987 s 6, Sch 2 para 1).

2 Diplomatic Privileges Act 1964 Sch 1 art 45(a) (as added: see note 1). As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 Diplomatic and Consular Premises Act 1987 Sch 1 art 45(b) (as added: see note 1).

4 Diplomatic and Consular Premises Act 1987 Sch 1 art 45(c) (as added: see note 1).

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### 273. Personal privileges and immunities of diplomatic agents.

The person of a diplomatic agent<sup>1</sup> is inviolable<sup>2</sup>. He is not liable to any form of arrest or detention, and the United Kingdom must treat him with due respect and take all appropriate steps to prevent any attack on his person, freedom or dignity<sup>3</sup>. His private residence enjoys the same inviolability and protection as the premises of the mission<sup>4</sup>. His papers, correspondence and property likewise enjoy inviolability<sup>5</sup>. Members of a diplomatic mission are not subject to restrictions upon immigration of persons who are not British citizens<sup>6</sup>.

1 'Diplomatic agent' means the head of the mission or a member of the diplomatic staff: Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 1(e). As to the meaning of 'head of the mission' see PARA 266 note 4; and as to the meaning of 'member of the diplomatic staff' see PARA 269 note 2. References to 'diplomatic agent' also include:

- 6 (1) references to any person designated by the government of the People's Republic of China as a member of the Joint Liaison Group set up under the Joint Declaration of the Government of the United Kingdom and the Government of the People's Republic of China on the Question of Hong Kong which was signed in Peking on 19 December 1984 para 5 (Hong Kong Act 1985 ss 1(2), 2(2), Schedule para 4);
- 7 (2) any person designated by a state other than the United Kingdom as an observer or inspector under the Stockholm Document (ie the document dated 19 September 1986 and concluded at the Stockholm Conference on confidence and security building measures and disarmament in Europe) (Arms Control and Disarmament (Privileges and Immunities) Act 1988 s 1(1)(a), (4)).

As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

Her Majesty may by Order in Council confer such privileges and immunities (not exceeding those conferred by the Diplomatic Privileges Act 1964) as appear to Her Majesty to be required for giving effect to any provision of an international agreement or arrangement superseding the Stockholm Document or otherwise making provision for furthering arms control or disarmament; but no such order may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: Arms Control and Disarmament (Privileges and Immunities) Act 1988 s 1(2). For orders under this provision see the Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles (Inspections) (Privileges and Immunities) Order 1988, SI 1988/792; the Treaty on Open Skies (Privileges and Immunities) Order 1993, SI 1993/1246; the Treaty on Open Skies (Privileges and Immunities) (Overseas Territories) Order 1993, SI 1993/1247; and the Treaty on Open Skies (Privileges and Immunities) (Guernsey) Order 1993, SI 1993/2669; the Vienna Document 1999 (Privileges and Immunities) Order 2003, SI 2003/2621.

If in any proceedings any question arises whether or not any person is entitled to any privilege or immunity by virtue of the Arms Control and Disarmament (Privileges and Immunities) Act 1988, a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question is conclusive evidence of that fact: s 1(3). As to the Secretary of State see PARA 29.

The Arms Control and Disarmament (Privileges and Immunities) Act 1988 may be extended to the Channel Islands, the Isle of Man, or any colony: see s 2(3). See the Arms Control and Disarmament Act 1988 (Guernsey) Order 1993, SI 1993/2666; and the Arms Control and Disarmament (Privileges and Immunities) Act 1988 (Overseas Territories) Order 1992, SI 1992/1298, extending the Act, subject to modifications, to the following: Anguilla; Bermuda; British Antarctic Territory; British Indian Ocean Territory; Cayman Islands; Falkland Islands; Gibraltar; Hong Kong; Montserrat; Pitcairn, Henderson, Ducie and Oeno Islands; St Helena and Dependencies; South Georgia and the South Sandwich Islands; Sovereign Base Areas of Akrotiri and Dhekelia; Turks and Caicos Islands; Virgin Islands.

The members of inspection teams and observers under the Chemical Weapons Act 1996 enjoy the same privileges and immunities as are enjoyed by diplomatic agents in accordance with the Diplomatic Privileges Act 1964 Sch 1 arts 29, 30 paras 1, 2, 31 paras 1-3, 34: Chemical Weapons Act 1996 s 27 (see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 490). Similar (but not identical) provision is made by the Arms Control and Disarmament (Inspections) Act 1991 s 5 (see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 503),

the Nuclear Explosions (Prohibition and Inspections) Act 1998 s 8 (not in force at the date at which this volume states the law), and the Landmines Act 1998 s 15 (see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 500).

2 Diplomatic Privileges Act 1964 Sch 1 art 29. Such inviolability precludes personal service of legal process on a diplomat: see *Adams v DPP, Judge for District No 16, Her Majesty's Secretary of State for Home Affairs, Ireland* [2001] 1 IR 47, [2001] 2 ILRM 401 (Irish court held service of process on British Ambassador to Ireland contravened his personal inviolability under art 29 as well as the inviolability of the premises, and was therefore ineffective).

In 1974 the United Nations adopted a Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973; TS 3 (1980); Cmnd 7765), which provides for punishment for attacks and threats of attacks on certain persons, including heads of states, representatives or international organisations and members of their families and households. Its provisions were implemented by the Internationally Protected Persons Act 1978: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 477. As to immunity from criminal and civil jurisdiction see the Diplomatic Privileges Act 1964 Sch 1 art 31; and PARA 274.

3 Diplomatic Privileges Act 1964 Sch 1 art 29. See *Aziz v Aziz (Sultan of Brunei intervening)* [2007] EWCA Civ 712, [2008] 2 All ER 501, [2007] NLJR 1047.

4 Diplomatic Privileges Act 1964 Sch 1 art 30 para 1. As to the premises of the mission see PARA 269; and *Agbor v Metropolitan Police Comr* [1969] 2 All ER 707, [1969] 1 WLR 703, CA (private residence temporarily vacated: court held flat no longer residence of a diplomatic agent and therefore the executive had no right to evict subsequent occupiers who claimed to be there as of right); *Re B (Care Proceedings: Diplomatic Immunity)* [2002] EWHC 1751 (Fam), [2003] Fam 16, [2003] 1 FLR 241 (where court considered issue of whether proper to continue interim care order in respect of a child of a member of the administrative and technical staff of a diplomatic mission, given that the father and his private residence were inviolable, so that order may not be capable of enforcement). See also Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (3rd Edn, 2008) pp 271-274.

5 Diplomatic Privileges Act 1964 Sch 1 art 30 para 2. With respect to property, this provision is subject to the exception relating to execution: see Sch 1 art 31 para 3; and PARA 274.

6 See the Immigration Act 1971 s 8(3) (amended by the British Nationality Act 1981 s 39(6); and the Immigration Act 1988 s 4). This applies to all members of a mission or persons who are members of the family forming part of the household of such a member, or a person otherwise entitled to like immunity: Immigration Act 1971 s 8(3) (as so amended). For the purposes of s 8(3), a member of a mission other than a diplomatic agent is not to count as a member of a mission unless (1) he was resident outside the United Kingdom, and was not in the United Kingdom, when he was offered a post as such a member; and (2) he has not ceased to be such a member after having taken up the post: s 8(3A) (added by the Immigration Act 1988 s 4; and substituted by the Immigration and Asylum Act 1999 s 6).

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## **274. Immunity from jurisdiction.**

A diplomatic agent enjoys immunity from the criminal jurisdiction of the courts of the United Kingdom<sup>1</sup>. He also enjoys immunity from the civil and administrative jurisdiction except in the following cases<sup>2</sup>:

- 35 (1) a real action relating to his private immovable property in the territory of the United Kingdom, unless he holds it on behalf of the sending state for the purposes of the mission<sup>3</sup>;
- 36 (2) an action relating to succession in which he is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state<sup>4</sup>; and
- 37 (3) an action relating to any professional or commercial activity which he may exercise in the United Kingdom outside his official functions<sup>5</sup>.

Except in these cases, no measures of execution may be taken in respect of him, and then only if the measures can be taken without infringing the inviolability of his person or of his residence<sup>6</sup>. He is not obliged to give evidence as a witness<sup>7</sup>. Except and in so far as additional immunities may be conferred on them by Order in Council, diplomatic agents who are citizens of the United Kingdom and Colonies, or permanently resident in the United Kingdom, only enjoy immunity in respect of official acts performed in the exercise of their functions<sup>8</sup>.

The immunity of a diplomatic agent from the jurisdiction of the United Kingdom does not exempt him from the jurisdiction of the sending state<sup>9</sup>.

1 Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 31 para 1. As to the meaning of 'diplomatic agent' see PARA 273 note 1. He is, however, under a duty to respect United Kingdom laws and regulations and to abstain from interfering in its internal affairs: Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) art 41 para 1. For an official Memorandum of Diplomatic Privileges and Immunities in the United Kingdom see British Practice in International Law (1966) 126. For an extension of the immunities conferred by these provisions see the Acts and orders noted in PARA 273 note 1. As to the provisions of the Vienna Convention on Diplomatic Relations given force of law in the United Kingdom see PARA 265 text and note 2. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

2 Diplomatic Privileges Act 1964 Sch 1 art 31 para 1. A person becoming entitled to immunity after an action has begun is entitled to a stay of proceedings: *Ghosh v D'Rozario* [1963] 1 QB 106, [1962] 2 All ER 640, CA. Immunity does not import exemption from legal liability, but only from jurisdiction: *Dickinson v Del Solar* [1930] 1 KB 376, 6 BILC 142. See also *Shaw v Shaw* [1979] Fam 62, [1979] 3 All ER 1 (loss of diplomatic immunity before summons heard removed jurisdictional bar to the hearing).

3 Diplomatic Privileges Act 1964 Sch 1 art 31 para 1(a); and see *Intpro Properties (UK) Ltd v Sauvel* [1983] QB 1019, [1983] 2 All ER 495, CA (the fact that premises were used as a private residence by a diplomat and for social entertaining was not sufficient to satisfy test of their being 'used for the purposes of a diplomatic mission').

4 Diplomatic Privileges Act 1964 Sch 1 art 31 para 1(b).

5 Diplomatic Privileges Act 1964 Sch 1 art 31 para 1(c). See *Propend Finance Property Ltd v Sing* (1997) 111 ILR 611 at 659-661, Times 2 May, CA. See also and Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (3rd Edn, 2008) pp 306-308. A diplomatic agent in the receiving state must not practise any professional or commercial activity for personal profit: Vienna Convention on Diplomatic Relations art 42.



6 Diplomatic Privileges Act 1964 Sch 1 art 31 para 3.

7 Diplomatic Privileges Act 1964 Sch 1 art 31 para 2.

8 Diplomatic Privileges Act 1964 ss 2(6), 6, Sch 1 art 38 para 1. Citizenship of the United Kingdom and Colonies (ie the territories comprising the United Kingdom and Colonies on 1 January 1949) no longer exists, having been replaced by new categories of citizenship: see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 16 et seq. A person who is a member of the mission (or is a private servant of such a member) of any of the countries mentioned below who is also a British national is entitled to such privileges and immunities as he would have been entitled to were he not a citizen of the United Kingdom and Colonies: Antigua and Barbuda; Australia; The Bahamas; Bangladesh; Barbados; Belize; Botswana; Brunei; Cameroon; Canada; Republic of Cyprus; Dominica; Fiji; The Gambia; Ghana; Grenada; Guyana; India; Republic of Ireland; Jamaica; Kenya; Kiribati; Lesotho; Malawi; Malaysia; Maldives; Malta; Mauritius; Mozambique; Namibia; Nauru; New Zealand; Nigeria; Pakistan; Papua New Guinea; St Christopher and Nevis; St Lucia; St Vincent and the Grenadines; Seychelles; Sierra Leone; Singapore; Solomon Islands; South Africa; Sri Lanka; Swaziland; Tanzania; Tonga; Trinidad and Tobago; Tuvalu; Uganda; Vanuatu; Western Samoa; Zambia; Zimbabwe: Diplomatic Privileges (British Nationals) Order 1999, SI 1999/670, art 2(2), Sch 1. 'British national' means a person who under the British Nationality Act 1981 and the British Nationality (Falkland Islands) Act 1983 is a British citizen, a British overseas territories citizen or a British Overseas citizen or who under the Hong Kong (British Nationality) Order 1986, SI 1986/948, is a British National (Overseas) (see generally **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**): Diplomatic Privileges (British Nationals) Order 1999, SI 1999/670, art 2(3) (amended by virtue of the British Overseas Territories Act 2002 s 2(3)).

For provisions relating to members of missions other than diplomatic agents see PARA 279 et seq. Jurisdiction must be exercised over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission: Diplomatic Privileges Act 1964 Sch 1 art 38 para 2.

9 Diplomatic Privileges Act 1964 Sch 1 art 31 para 4.

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## 275. Exemption from taxes.

A diplomatic agent<sup>1</sup> is exempt from all dues and taxes, personal and real, national, regional or municipal, except:

- 38 (1) indirect taxes of a kind which are normally incorporated in the price of goods or services<sup>2</sup>;
- 39 (2) dues and taxes on private immovable property situated in the territory of the United Kingdom, unless he holds it on behalf of the sending state for the purposes of the mission<sup>3</sup>;
- 40 (3) estate, succession or inheritance duties<sup>4</sup>;
- 41 (4) dues and taxes on private income having its source in the United Kingdom and capital taxes on investments made in commercial undertakings in the United Kingdom<sup>5</sup>;
- 42 (5) charges levied for specific services rendered<sup>6</sup>; and
- 43 (6) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property<sup>7</sup>.

The exemption does not normally apply to persons who are nationals of or permanently resident in the United Kingdom<sup>8</sup>.

1 As to the meaning of 'diplomatic agent' see PARA 273 note 1. For extension of the immunities conferred by these provisions see the Acts and orders noted in PARA 273 note 1.

2 Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 34(a).

3 Diplomatic Privileges Act 1964 Sch 1 art 34(b). As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

4 Diplomatic Privileges Act 1964 Sch 1 art 34(c). This is subject to Sch 1 art 39 para 4: see PARA 286.

5 Diplomatic Privileges Act 1964 Sch 1 art 34(d).

6 Diplomatic Privileges Act 1964 Sch 1 art 34(e).

7 Diplomatic Privileges Act 1964 Sch 1 art 34(f). This is subject to Sch 1 art 23: see PARA 269. Although the Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) art 34, as reproduced in the Diplomatic Privileges Act 1964 Sch 1, refers to stamp duty with respect to immovable property such duty has now largely been replaced by stamp duty land tax in English law: see **STAMP DUTIES AND STAMP DUTY RESERVE TAX**. HMRC guidance indicates the view that the relief afforded to stamp duty for diplomatic premises is applicable to stamp duty land tax see HMRC Stamp Duty Land Tax Manual para 20500, accessible on the date at which this volume states the law at [www.hmrc.gov.uk](http://www.hmrc.gov.uk).

8 Diplomatic Privileges Act 1964 ss 2(6), 6, Sch 1 art 38 para 1. See PARA 274.

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## **276. Exemption from social security provisions.**

A diplomatic agent<sup>1</sup> is exempt from the social security provisions in force in the United Kingdom with respect to services rendered for the sending state<sup>2</sup>. This also applies to private servants<sup>3</sup> in the sole employ of a diplomatic agent on condition that they are not citizens of the United Kingdom and Colonies or permanently resident in the United Kingdom and that they are covered by the social security provisions which may be in force in the sending state or a third state<sup>4</sup>. This does not preclude voluntary participation in the social security system of the United Kingdom by either of these classes of person<sup>5</sup>.

Nothing in the provisions described above affects bilateral or multilateral agreements concerning social security already concluded or to be concluded in the future<sup>6</sup>.

1 As to the meaning of 'diplomatic agent' see PARA 273 note 1.

2 Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 33 para 1. The exemption is deemed to except the services concerned from any class of employment which is insurable employment or in respect of which contributions are required to be paid under enactments relating to social security (see **SOCIAL SECURITY AND PENSIONS**) or any enactment relating to Northern Ireland, but not so as to render any person liable to pay any contribution which he would not be required to pay if those services were not so excepted: see s 2(4) (amended, and prospectively amended, by the Social Security Act 1973 ss 100, 101, Sch 27 para 24; and the Social Security (Consequential Provisions) Act 1975 ss 1(2), 5, Sch 1 Pt I). The exemption does not normally apply to persons who are nationals of the United Kingdom and Colonies or permanently resident in the United Kingdom: see PARA 274 text and note 8. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3. As to the expression 'United Kingdom and Colonies' see PARA 274 note 8.

3 'Private servant' means a person who is in the domestic service of a member of the mission and who is not an employee of the sending state: Diplomatic Privileges Act 1964 Sch 1 art 1(h). 'Members of the mission' means the head of the mission (see PARA 266 note 4) and the members of the staff of the mission; and 'members of the staff of the mission' means the members of the diplomatic staff and of the administrative and technical staff (see 269 note 2) and the members of the service staff of the mission: Sch 1 art 1(b), (c). 'Members of the service staff' means the members of the staff of the mission in the domestic service of the mission (Sch 1 art 1(g)); and it includes persons designated as auxiliary personnel by a state other than the United Kingdom performing domestic service (Arms Control and Disarmament (Privileges and Immunities) Act 1988 s 1(1)(b)). As to the Stockholm document, and the extension of privileges in connection therewith, see PARA 273 note 1.

4 Diplomatic Privileges Act 1964 Sch 1 art 33 para 2. A diplomatic agent who employs persons to whom the exemption does not apply must observe the obligations which the social security provisions impose upon employers: Sch 1 art 33 para 3.

5 See the Diplomatic Privileges Act 1964 Sch 1 art 33 para 4.

6 Diplomatic Privileges Act 1964 Sch 1 art 33 para 5.

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**277. Exemption from services.**

Diplomatic agents<sup>1</sup> are exempted from all personal services, from any public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting<sup>2</sup>. The exemption does not normally apply to persons who are nationals of the United Kingdom and Colonies or who are permanently resident in the United Kingdom<sup>3</sup>.

1 As to the meaning of 'diplomatic agent' see PARA 273 note 1.

2 Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 35.

3 See PARA 274 text and note 8. As to the expression 'United Kingdom and Colonies' see PARA 274 note 8.

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## 278. Importation of articles.

The Crown permits entry of and grants exemption from all customs duties<sup>1</sup>, taxes and related charges other than charges for storage, cartage and similar services, on articles for the official use of the mission and articles for the personal use of a diplomatic agent<sup>2</sup> or members of his family forming part of his household, including articles intended for his establishment<sup>3</sup>. The personal baggage of a diplomatic agent is exempt from inspection unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned, or articles the import or export of which is prohibited or is controlled by quarantine regulations<sup>4</sup>. This exemption does not normally apply to persons who are nationals of the United Kingdom and Colonies or who are permanently resident in the United Kingdom<sup>5</sup>.

1 The reference to customs duties must be construed as including a reference to excise duties chargeable on goods imported into the United Kingdom (see generally **CUSTOMS AND EXCISE**), and to value added tax charged in accordance with the Value Added Tax Act 1994 s 10 or s 15 (acquisitions from other member states and importations from outside the European Union) (see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARAS 19, 113); Diplomatic Privileges Act 1964 s 2(5A) (added by the Customs and Excise Management Act 1979 s 177(1), Sch 4 para 3; and amended by the Finance (No 2) Act 1992 s 14, Sch 3 para 87; and the Value Added Tax Act 1994 s 100(1), Sch 14 para 1). As to the relief from customs and excise duties for persons enjoying privileges and immunities under the Diplomatic Privileges Act 1964 see the Customs and Excise Duties (General Reliefs) Act 1979 ss 13A-13C; and **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARAS 887, 894. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

2 As to the meaning of 'diplomatic agent' see PARA 273 note 1.

3 Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 36 para 1. Articles for the official use of the mission include inspection equipment relating to the treaty on the elimination of intermediate and shorter-range missiles made between the United States and the Soviet Union; articles for the personal use of a diplomatic agent include those of inspectors and aircrew in the United Kingdom in connection with their official functions: Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles (Inspections) (Privileges and Immunities) Order 1988, SI 1988/792, arts 2, 4. The members of inspection teams and observers under the Chemical Weapons Act 1996 enjoy the same privileges as are enjoyed by diplomatic agents in accordance with the Diplomatic Privileges Act 1964 Sch 1 art 36 para 1(b), except in relation to articles the importing or exporting of which is prohibited by law or controlled by the enactments relating to quarantine: see the Chemical Weapons Act 1996 s 27; and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 490. A similar extension (subject to the same restriction) is made for the members of inspection teams and observers under the Nuclear Explosions (Prohibition and Inspections) Act 1998: Nuclear Explosions (Prohibition and Inspections) Act 1998 s 8 (not in force at the date at which this volume states the law).

4 Diplomatic Privileges Act 1964 Sch 1 art 36 para 2. Such inspection must be conducted in the presence of the diplomatic agent or his authorised representative: Sch 1 art 36 para 2.

5 See PARA 274 text and note 8. As to the expression 'United Kingdom and Colonies' see PARA 274 note 8.

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**279. Privileges of diplomatic agent's family.**

The members of the family of a diplomatic agent forming part of his household enjoy the privileges and immunities of a diplomatic agent<sup>1</sup>. This does not apply, however, in the case of citizens of the United Kingdom and Colonies<sup>2</sup>.

1 Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 37 para 1. The privileges and immunities referred to are those set out in Sch 1 arts 29-36: see PARA 273 et seq. As to the meaning of 'diplomatic agent' see PARA 273 note 1. As to waiver of these privileges and immunities see PARA 283. As to the meaning of the term 'members of the family of a diplomatic agent forming part of his household' see Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (3rd Edn, 2008) pp 391-396.

2 See PARA 274 text and note 8. As to the expression 'United Kingdom and Colonies' see PARA 274 note 8.

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## **280. Privileges of the administrative and technical staff.**

Members of the administrative and technical staff<sup>1</sup> of the mission, together with members of their families forming part of their respective households, who are not citizens of the United Kingdom and Colonies or permanently resident in the United Kingdom, enjoy all the privileges and immunities of a diplomatic agent<sup>2</sup> with the exception of those relating to the inspection of baggage<sup>3</sup>. The immunity from civil and administrative jurisdiction is confined to acts performed in the course of their duties<sup>4</sup>. The privilege relating to importation of articles<sup>5</sup> is confined to those imported at the time of first installation<sup>6</sup>.

1 As to the meaning of 'members of the administrative and technical staff' see PARA 269 note 2.

2 The privileges and immunities referred to are those set out in the Diplomatic Privileges Act 1964 s 2(1), Sch 1 arts 29-35, 36(1): see PARA 273 et seq. As to the meaning of 'diplomatic agent' see PARA 273 note 1. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3. As to the expression 'United Kingdom and Colonies' see PARA 274 note 8.

3 Diplomatic Privileges Act 1964 Sch 1 art 37 para 2. As to the baggage exception see Sch 1 art 36 para 2; and PARA 278. As to waiver of these privileges and immunities see PARA 283.

4 Diplomatic Privileges Act 1964 Sch 1 art 37 para 2. As to this immunity see Sch 1 para 31 art 1; and PARA 274. See also *Re B (Care Proceedings: Diplomatic Immunity)* [2002] EWHC 1751 (Fam), [2003] Fam 16, [2003] 1 FLR 241 (acts leading to imposition of interim care order in respect of child of member of the administrative and technical staff of a diplomatic mission were acts performed outside the course of father's diplomatic duties). Where the immunity of a diplomatic agent was removed by this provision upon his being classified as a member of the administrative and technical staff, an existing action against him which had been stayed could be continued: *Empson v Smith* [1966] 1 QB 426, [1965] 2 All ER 881, CA.

5 See the Diplomatic Privileges Act 1964 Sch 1 art 36 para 1; and PARA 278.

6 Diplomatic Privileges Act 1964 Sch 1 art 37 para 2.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(6) DIPLOMATIC PRIVILEGES AND IMMUNITIES/281. Privileges of the service staff.

## **281. Privileges of the service staff.**

Members of the service staff<sup>1</sup> of the mission who are not citizens of the United Kingdom and Colonies or permanently resident in the United Kingdom enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and exemption from social security provisions<sup>2</sup>.

Private servants<sup>3</sup> of members of the mission, unless they are citizens of the United Kingdom and Colonies or permanently resident in the United Kingdom, are exempt from dues and taxes on the emoluments they receive by reason of their employment<sup>4</sup>. In other respects they may enjoy such privileges and immunities only as specified by Order in Council<sup>5</sup>. However, jurisdiction must be exercised in such a manner as not to interfere unduly with the performance of the functions of the mission<sup>6</sup>.

1 As to the meaning of 'members of the service staff' see PARA 276 note 3.

2 Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 37 para 3. As to the exemption in respect of social security provisions see PARA 276. As to waiver of these privileges and immunities see PARA 283. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3. As to the expression 'United Kingdom and Colonies' see PARA 274 note 8.

3 As to the meaning of 'private servant' see PARA 276 note 3.

4 Diplomatic Privileges Act 1964 Sch 1 art 37 para 4. As to waiver of these privileges and immunities see PARA 283.

5 Diplomatic Privileges Act 1964 ss 2(6), 6, Sch 1 art 37 para 4. See the Diplomatic Privileges (British Nationals) Order 1999, SI 1999/670; and PARA 274.

6 Diplomatic Privileges Act 1964 Sch 1 art 37 para 4.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(6) DIPLOMATIC PRIVILEGES AND IMMUNITIES/282. Official information as to status.

**282. Official information as to status.**

If in any proceedings any question arises whether or not any person is entitled to any privilege or immunity under the Diplomatic Privileges Act 1964, a certificate issued by or under the authority of the Secretary of State<sup>1</sup> stating any fact relating to that question is conclusive evidence of that fact<sup>2</sup>.

1 As to the Secretary of State see PARA 29.

2 Diplomatic Privileges Act 1964 s 4.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(6) DIPLOMATIC PRIVILEGES AND IMMUNITIES/283. Waiver of privilege.

### **283. Waiver of privilege.**

The privileges and immunities of diplomatic agents and their families and of the administrative, technical and service staff and private servants<sup>1</sup> may be waived by the sending state<sup>2</sup>. A waiver by the head of the mission or any person for the time being performing his functions is deemed to be a waiver by that state<sup>3</sup>. Waiver must always be express<sup>4</sup>. Accordingly, even if a person entitled to immunity has entered an appearance or pleaded otherwise than to the jurisdiction, he may at a later stage prove that his government has not consented to a waiver of his immunity<sup>5</sup>. Waiver in respect of civil or administrative proceedings is not to be held to imply waiver in respect of execution, for which a separate waiver is necessary<sup>6</sup>. In such a case, judgment may be given against the defendant but not enforced until a reasonable time after the termination of his mission<sup>7</sup>.

1 The persons enjoying immunity under the Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 37: see PARAS 885-887. As to the meaning of 'diplomatic agent' see PARA 273 note 1; As to the meaning of 'members of the administrative and technical staff' see PARA 269 note 2. As to the meaning of 'private servants' see PARA 276 note 3.

2 Diplomatic Privileges Act 1964 Sch 1 art 32 para 1. See *Fayed v Al-Tajir* [1988] QB 712, [1987] 2 All ER 396, CA (the defendant's defence filed in proceedings brought against him not an appropriate vehicle for waiver of immunity by his state).

3 Diplomatic Privileges Act 1964 s 2(3). This provision embraces the case where the head of mission waives his own privilege, not merely that of a subordinate member of the staff of the mission. As to the meaning of 'head of the mission' see PARA 266 note 4.

4 Diplomatic Privileges Act 1964 Sch 1 art 32 para 2. See *A Company Ltd v Republic of X* [1990] 2 Lloyd's Rep 520 at 524 per Saville J; *Propend Finance Pty Ltd v Sing* (1997) 111 Int LR 611, CA (undertaking given to the court not an express waiver).

5 *Republic of Bolivia Exploration Syndicate Ltd* [1914] 1 Ch 139 at 156, 6 BILC 39; and see *R v Madan* [1961] 2 QB 1, [1961] 1 All ER 588, CCA (criminal prosecution).

6 Diplomatic Privileges Act 1964 Sch 1 art 32 para 4.

7 *Re Suarez, Suarez v Suarez* [1918] 1 Ch 176, 6 BILC 64, CA.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(6) DIPLOMATIC PRIVILEGES AND IMMUNITIES/284. Waiver by institution of proceedings.

**284. Waiver by institution of proceedings.**

Institution of proceedings by a diplomatic agent or member of his family or the staff of the mission precludes him from invoking immunity from the jurisdiction in respect of a counterclaim directly connected with the principal claim<sup>1</sup>. If such a person brings an action the court may order him to give security for costs<sup>2</sup>.

1 Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 32 para 3. The agent may, however, invoke immunity in respect of a counterclaim not directly connected with the principal claim: *High Comr for India v Ghosh* [1960] 1 QB 134, [1959] 3 All ER 659, CA. As to the meaning of 'diplomatic agent' see PARA 273 note 1.

2 See *Emperor of Brazil v Robinson* (1837) 6 Ad & El 801, 1 BILC 127 (head of state). Cf, however, *Duke of Montellano v Christin* (1816) 5 M & S 503, 6 BILC 4.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(6) DIPLOMATIC PRIVILEGES AND IMMUNITIES/285. Duration of privileges and immunities.

## **285. Duration of privileges and immunities.**

A person entitled to privileges and immunities enjoys them from the moment he enters the United Kingdom in proceeding to take up his post or, if he is already there, from the moment when his appointment is notified<sup>1</sup> to the department of the Secretary of State<sup>2</sup>. When his functions have come to an end the privileges and immunities normally cease when he leaves the United Kingdom, or on expiry of a reasonable period in which to do so, but subsist until that time even in case of armed conflict; with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity continues<sup>3</sup>.

1 If the person was not already in this country he enjoys privileges and immunities from the moment of entry, and this does not depend on notification; if he was already in this country, he enjoys privileges and immunities from the time of notification, and this does not depend on his acceptance by the Secretary of State: *R v Secretary of State for the Home Department, ex p Bagga* [1991] 1 QB 485, [1991] 1 All ER 777, CA (doubting dictum in *R v Governor of Pentonville Prison, ex p Teja* [1971] 2 QB 274, [1971] 2 All ER 11, DC; and disagreeing with *R v Lambeth Justices, ex p Yusufu* [1985] Crim LR 510). As to the Secretary of State see PARA 29. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

2 Diplomatic Privileges Act 1964 s 2(1), (2), Sch 1 art 39 para 1. He can claim immunity if he only becomes entitled to it after service of the claim form: *Ghosh v D'Rozario* [1963] 1 QB 106, [1962] 2 All ER 640, CA. The running of a period of limitation is suspended during such time as immunity subsists: *Musurus Bey v Gadban* [1894] 2 QB 352, 6 BILC 32, CA.

3 Diplomatic Privileges Act 1964 Sch 1 art 39 para 2. See also *Re P (Children Act: Diplomatic Privilege)* [1998] 1 FLR 624 (removing children from the jurisdiction at the end of a diplomaticating not an act within the exercise of diplomatic functions). Cf *Zoernsch v Waldock* [1964] 2 All ER 256, [1964] 1 WLR 675, CA. A former head of state is in a comparable position: see the State Immunity Act 1978 s 20(1); *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, sub nom *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening) (No 3)* [1999] 2 All ER 97, HL; and PARA 263.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(6) DIPLOMATIC PRIVILEGES AND IMMUNITIES/286. Death.

## **286. Death.**

In the case of the death of a member of the mission<sup>1</sup>, his family continue to enjoy privileges and immunities until the expiry of a reasonable time in which to leave the United Kingdom<sup>2</sup>. In the event of the death of a member of a mission who is not a citizen of the United Kingdom and Colonies<sup>3</sup> or not permanently resident in the United Kingdom, or of a member of his family forming part of his household, withdrawal from the country of his movable property, except any acquired here and whose export is prohibited at the time of his death, is permitted<sup>4</sup>. Accordingly, inheritance tax is not levied on movable property the presence of which in the United Kingdom was due solely to the deceased's presence as a member of the mission or as a member of the family of a member of the mission<sup>5</sup>.

1 As to the meaning of 'members of the mission' see PARA 276 note 3.

2 Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 39 para 3. A coroner is precluded from investigating the death of a person who, if alive, would have been entitled to diplomatic immunity unless the privilege is waived: see **CORONERS** vol 9(2) (2006 Reissue) PARA 958. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 As to the expression 'United Kingdom and Colonies' see PARA 274 note 8.

4 Diplomatic Privileges Act 1964 Sch 1 art 39 para 4.

5 See the Diplomatic Privileges Act 1964 Sch 1 art 39 para 4; and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 610.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(6) DIPLOMATIC PRIVILEGES AND IMMUNITIES/287. Diplomatic agents accredited to third states.

### **287. Diplomatic agents accredited to third states.**

If a diplomatic agent<sup>1</sup> passes through or is in the United Kingdom while proceeding to take up or to return to his post, or when returning to his own country, he is accorded inviolability and such other immunities as may be required to ensure his transit or return<sup>2</sup>. The same applies to any members of his family enjoying privileges or immunities who are accompanying him, or travelling separately to join him or return to their own country<sup>3</sup>. In such circumstances the United Kingdom is under an obligation not to hinder the passage of members of the administrative and technical or service staff<sup>4</sup> of a mission and of members of their families<sup>5</sup>. These obligations apply to such persons whose presence in the United Kingdom is due to force majeure<sup>6</sup>.

1 As to the meaning of 'diplomatic agent' see PARA 273 note 1.

2 Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 40 para 1. See Satow's Diplomatic Practice (6th Edn, 2009) pp 169-174. There is no requirement that the diplomatic agent or his family be in transit between his country and the country to which he is accredited: *R v Guildhall Magistrates' Court, ex p Jarrett-Thorpe* (1977) Times, 6 October, DC. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 Diplomatic Privileges Act 1964 Sch 1 art 40 para 1.

4 As to the meaning of 'members of the administrative and technical staff' see PARA 269 note 2; and as to the meaning of 'members of the service staff' see PARA 276 note 3.

5 Diplomatic Privileges Act 1964 Sch 1 art 40 para 2. As to communications and diplomatic couriers see Sch 1 art 40 para 3; and PARA 268 notes 2, 5.

6 Diplomatic Privileges Act 1964 Sch 1 art 40 para 4. The Act does not deal with other diplomatic agents present in the United Kingdom otherwise than in transit or because of force majeure, on which conflicting views were expressed in *New Chile Gold Mining Co v Blanco* (1888) 4 TLR 346, 6 BILC 236, DC, which was decided upon another point. See also *R v Governor of Pentonville Prison, ex p Teja* [1971] 2 QB 274, [1971] 2 All ER 11, DC, where an economic adviser to Costa Rica on a special mission, carrying a diplomatic passport and credentials, was held not to have diplomatic immunity.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(6) DIPLOMATIC PRIVILEGES AND IMMUNITIES/288. Reciprocal withdrawal of privileges.

**288. Reciprocal withdrawal of privileges.**

If the privileges and immunities accorded to a mission of Her Majesty in the territory of any state, or to persons connected with that mission, are less than those conferred under the law of the United Kingdom<sup>1</sup> on the mission of that state or upon persons connected with it, the latter may be withdrawn by Order in Council<sup>2</sup>.

<sup>1</sup> See under the Diplomatic Privileges Act 1964 (see s 3(1)); and the Diplomatic and other Privileges Act 1971 (see s 1(3)). As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

<sup>2</sup> Diplomatic Privileges Act 1964 s 3(1). Any such Order in Council must be disregarded for the purposes of the British Nationality Act 1981 s 50(4) (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 26): Diplomatic Privileges Act 1964 s 3(2) (substituted by the British Nationality Act 1981 s 52(6), Sch 7). At the date at which this volume states the law no such orders were in force.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(6) DIPLOMATIC PRIVILEGES AND IMMUNITIES/289. Reciprocal extension of privileges.

**289. Reciprocal extension of privileges.**

Where any special agreement or arrangement between the government of any state and the government of the United Kingdom was in force on 1 October 1964<sup>1</sup> providing for more extended immunities than are conferred by the Diplomatic Privileges Act 1964, such arrangements continue after that date for so long as the agreement or arrangement continues in force<sup>2</sup>.

<sup>1</sup> See the date of commencement of the Diplomatic Privileges Act 1964: see s 8(3); and the Diplomatic Privileges Act 1964 (Commencement) Order 1964, SI 1964/1400. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

<sup>2</sup> See the Diplomatic Privileges Act 1964 s 7(1) (amended by the Customs and Excise Management Act 1979 s 177(1), Sch 4 para 12). Publication of such agreements or arrangements is to be made in the London, Edinburgh and Belfast Gazettes: Diplomatic Privileges Act 1964 s 7(2). See the London Gazettes of 1 October 1964, and 1 March 1965; and British Practice in International Law 1964 (II) 225.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(7) CONSULAR PRIVILEGES AND IMMUNITIES/290. The Vienna Convention on Consular Relations.

## **(7) CONSULAR PRIVILEGES AND IMMUNITIES**

### **290. The Vienna Convention on Consular Relations.**

The United Kingdom is a party to the Vienna Convention on Consular Relations<sup>1</sup>, certain provisions of which<sup>2</sup> form part of the law of the United Kingdom by virtue of the Consular Relations Act 1968<sup>3</sup>. The Act applies to every consular post in the United Kingdom, whether or not the sending state is a party to the Convention. It does not apply to diplomatic posts or diplomatic agents<sup>4</sup>, nor to international organisations and persons connected with them<sup>5</sup>.

1 The Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219). The Convention was adopted at the United Nations Conference on Consular Relations, which also adopted an Optional Protocol concerning the Compulsory Settlement of Disputes, to which the United Kingdom is a party, and an Optional Protocol concerning Acquisition of Nationality, to which it is not a party. The Convention codified customary international law: *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran) (Provisional Measures)* ICJ Reports 1979, 7 at 19-20; *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3 at 42.

The United Kingdom has not signed the European Convention on Consular Functions of 1967 (Paris, 11 December 1967; European TS No 61).

2 The Vienna Convention on Consular Relations arts 1, 5, 15, 17, 31 (paras 1, 2, 3, 4), 32, 33, 35, 39, 41, 43-45, 48-54, 55 (paras 2, 3), 57, 58, 59, 60-62, 66, 67, 70 (paras 1, 2, 4), 71.

3 Consular Relations Act 1968 s 1(1), Sch 1. Sections 7-11 came into operation upon receiving the royal assent on 10 April 1968 (s 16(3)), and the remainder on 1 January 1971 (Consular Relations Act 1968 (Commencement) Order 1970, SI 1970/1684). As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

4 As to diplomatic agents see the Diplomatic Privileges Act 1964; and PARA 265 et seq.

5 As to international organisations see the International Organisations Act 1968; and PARA 307 et seq.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(7) CONSULAR PRIVILEGES AND IMMUNITIES/291. In general.

## 291. In general.

Those articles of the Vienna Convention on Consular Relations<sup>1</sup> which are not included in the Consular Relations Act 1968<sup>2</sup> do not give rise to rights and duties directly enforceable in the domestic courts of the United Kingdom. They include provisions respecting the establishment of consular relations<sup>3</sup> and consular posts<sup>4</sup> and the exercise of consular functions<sup>5</sup>. Heads of consular posts are divided into four classes: (1) consuls-general; (2) consuls; (3) vice-consuls; and (4) consular agents<sup>6</sup>. The convention also contains provisions regarding precedence of consular posts<sup>7</sup>, the appointment of members of consular staffs<sup>8</sup>, the size of consular staffs<sup>9</sup>, precedence between members of the staff<sup>10</sup>, their nationality<sup>11</sup>, persons who are declared *persona non grata*<sup>12</sup> and notification of appointments, arrivals and departures<sup>13</sup>.

1 See the Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219).

2 For the articles of the Vienna Convention on Consular Relations which are included in the Consular Relations Act 1968 see PARA 290 note 2.

3 See the Vienna Convention on Consular Relations art 2.

4 See the Vienna Convention on Consular Relations art 4. As to the meaning of 'consular post' see PARA 292 note 4.

5 See the Vienna Convention on Consular Relations arts 5-8. As to consular functions see PARA 292.

6 Vienna Convention on Consular Relations art 9. As to the meaning of 'head of consular post' see PARA 292 note 4.

7 See the Vienna Convention on Consular Relations art 16.

8 See the Vienna Convention on Consular Relations arts 18, 19. 'Members of the consular staff' means consular officer, other than the head of a consular post, consular employees and members of the service staff: art 1 para 1(h). As to the meaning of 'consular officer' see PARA 292 note 5. As to the meanings of 'consular employee' and 'member of the service staff' see PARA 295 note 1.

9 See the Vienna Convention on Consular Relations art 20.

10 See the Vienna Convention on Consular Relations art 21.

11 See the Vienna Convention on Consular Relations art 22.

12 See the Vienna Convention on Consular Relations art 23.

13 See the Vienna Convention on Consular Relations art 24.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(7) CONSULAR PRIVILEGES AND IMMUNITIES/292. Functions.

## 292. Functions.

Unlike diplomatic agents, consular agents do not represent states in all their international relations and they are not accredited to the receiving state<sup>1</sup>. A consul renders in the territory of the receiving state only non-political and technical services for the sending state and its nationals and nationals of the receiving state. The Vienna Convention on Consular Relations lists a great variety of functions, the principal ones being:

- 44 (1) the protection and promotion of trade;
- 45 (2) the assistance to vessels and aircraft and their crews and aid in the inspection of ships in accordance with local health and sanitary laws;
- 46 (3) the provision of services to nationals of the sending state, as by assisting in the protection of their rights and interests; and
- 47 (4) the performance of various administrative and notarial functions for nationals of both the sending state and the receiving state including the issue of passports, visas and travel documents<sup>2</sup>.

The Convention makes provisions regarding the termination of the consular function<sup>3</sup>. Further provisions are made regarding the temporary exercise of the functions of the head of a consular post<sup>4</sup>, the performance of diplomatic acts by consular officers<sup>5</sup> where the sending state has no diplomatic mission or facilities<sup>6</sup>, for the exercise of consular functions by diplomatic missions<sup>7</sup>, and for the representation of states at intergovernmental organisations by their consular officers<sup>8</sup>.

1 Appointment of a consular agent is usually effected by a commission or similar instrument and recognition of his authority by the receiving state by means of an exequatur. For the provisions of the Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219) concerning these matters see arts 10-14; and as to the appointment of the same person by two or more states see art 18.

2 See the Vienna Convention on Consular Relations art 5. The list of functions contained in the Convention is enacted into the law of the United Kingdom by the Consular Relations Act 1968 s 1(1), Sch 1 art 5. As to functions in relation to the administration of estates of deceased persons, and to shipping and aircraft see PARA 303. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 See the Vienna Convention on Consular Relations arts 25, 26.

4 Consular Relations Act 1968 Sch 1 art 15. 'Head of a consular post' means the person charged with the duty of acting in that capacity: Sch 1 art 1 para 1(c). 'Consular post' means any consulate-general, consulate, vice-consulate or consular agency; and 'consular district' means the area assigned to a consular post for the exercise of consular functions: Sch 1 art 1 para 1(a), (b).

5 'Consular officer' means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions: Consular Relations Act 1968 Sch 1 art 1(d). Consular officers are of two categories: career consular officers and honorary consular officers: Sch 1 art 1 para 2.

6 If a sending state has no diplomatic mission in the United Kingdom, and is not represented by a diplomatic mission of a third state, a consular officer may, with the consent of the United Kingdom, and without affecting his consular status, be authorised to perform diplomatic acts. The performance of such acts by a consular officer does not confer upon him any right to claim diplomatic privileges and immunities: Consular Relations Act 1968 Sch 1 art 17.

7 See the Consular Relations Act 1968 Sch 1 art 70 para 1. The names of members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the mission

must be notified to the Secretary of State: see Sch 1 art 70 para 2. The privileges and immunities of those persons continue to be governed by the provisions of the Diplomatic Privileges Act 1964 (see PARA 265 et seq): Consular Relations Act 1968 s 1(10), Sch 1 art 70 para 4. As to the Secretary of State see PARA 29.

8 A consular officer may, after notification addressed to the United Kingdom, act as representative of the sending state to any intergovernmental organisation; when so acting, he is entitled to enjoy any privileges and immunities accorded to such a representative by customary international law or by international agreements; however, in respect of the performance by him or any consular function, he is not entitled to any greater immunity from jurisdiction than that to which a consular officer is generally entitled: see Consular Relations Act 1968 Sch 1 art 17 para 2.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(7) CONSULAR PRIVILEGES AND IMMUNITIES/293. The consular post.

### 293. The consular post.

Consular premises<sup>1</sup> are inviolable to the extent that the authorities of the United Kingdom<sup>2</sup> must not enter that part of them which is used exclusively for the purpose of the work of the consular post, except with the consent of the head of the consular post<sup>3</sup> or his designee or the head of the diplomatic mission of the sending state<sup>4</sup>. The premises, their furnishings, the property of the consular post and its means of transport are exempt from any form of requisition for purposes of national defence or public utility<sup>5</sup>. Consular premises and the residence of the career head of the consular post<sup>6</sup> of which the sending state is the owner or lessee are exempt from taxes and dues other than those representing payment for services rendered<sup>7</sup>. Consular archives<sup>8</sup> and documents, wherever they may be, and official correspondence<sup>9</sup> are inviolable<sup>10</sup>. The consular post may levy such fees and charges as are provided for consular acts by United Kingdom law<sup>11</sup>, and sums collected in this form are exempt from all dues and taxes<sup>12</sup>.

1 'Consular premises' means the buildings or parts of buildings and the land ancillary to them, irrespective of ownership, used exclusively for the purposes of the consular post: Consular Relations Act 1968 s 1(1), Sch 1 art 1 para 1(j). As to the meaning of 'consular post' see PARA 292 note 4. The United Kingdom is under an obligation to facilitate and assist in the acquisition of consular premises and accommodation for members of the consular post (see PARA 295 note 1): Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219) art 30. The national flag and coat of arms may be displayed: art 29. The premises must not be used in a manner incompatible with the exercise of diplomatic functions: Consular Relations Act 1968 Sch 1 art 55 para 2. As to protection of consular premises and archives in exceptional circumstances see Sch 1 art 27; and PARA 294. As to the acquisition and loss by land of consular status see the Diplomatic and Consular Premises Act 1987 s 1; and PARA 270. As to consular functions see PARA 292. The consular post does not form part of the territory of the sending state: see *Radwan v Radwan* [1973] Fam 24, [1972] 3 All ER 967; and PARA 269 note 2.

2 'Authorities of the United Kingdom' is to be construed as including any constable and any person exercising a power of entry to any premises under any enactment: Consular Relations Act 1968 s 1(2). As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 As to the meaning of 'head of consular post' see PARA 292 note 4.

4 Consular Relations Act 1968 Sch 1 art 31 paras 1, 2. The consent may be assumed in case of fire or other disaster requiring prompt protective action: Sch 1 art 31 para 1. The United Kingdom is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity: Sch 1 art 31 para 3 (added by the Diplomatic and Consular Premises Act 1987 s 6, Sch 2 para 5). See also PARA 269 note 3.

5 Consular Relations Act 1987 Sch 1 art 31 para 4. If, however, expropriation is necessary for such purposes, all possible steps must be taken to avoid impeding the performance of consular functions, and prompt and adequate compensation must be paid to the sending state: Sch 1 art 31 para 4.

6 See PARA 292 note 5.

7 Consular Relations Act 1968 Sch 1 art 32 para 1. The exemption does not apply to such dues and taxes if they are payable by the person who contracted with the state or with a person acting on its behalf: Sch 1 art 32 para 2.

8 'Consular archives' includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with ciphers and codes, the card indexes and articles of furniture intended for their protection or safekeeping: Consular Relations Act 1968 Sch 1 art 1 para 1(k).

9 'Official correspondence' means all correspondence relating to the consular post and its functions: Consular Relations Act 1968 Sch 1 art 35 para 2.

- 10 Consular Relations Act 1968 Sch 1 arts 33, 35 para 2. As to freedom of communication see PARA 295.
- 11 Consular Relations Act 1968 Sch 1 art 39 para 1.
- 12 Consular Relations Act 1968 Sch 1 art 39 para 2.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(7) CONSULAR PRIVILEGES AND IMMUNITIES/294. Protection of consular premises and archives and of the interests of the sending state in exceptional circumstances.

**294. Protection of consular premises and archives and of the interests of the sending state in exceptional circumstances.**

In the event of the severance of consular relations between two states<sup>1</sup>:

- 48 (1) the receiving state must, even in case of armed conflict, respect and protect the consular premises<sup>2</sup>, together with the property of the consular post<sup>3</sup> and the consular archives<sup>4</sup>;
- 49 (2) the sending state may entrust the custody of the consular premises, together with the property contained therein and the consular archives, to a third state acceptable to the receiving state<sup>5</sup>;
- 50 (3) the sending state may entrust the protection of its interests and those of its nationals to a third state acceptable to the receiving state<sup>6</sup>.

In the event of the temporary or permanent closure of a consular post, head (1) above applies<sup>7</sup>. In addition, if the sending state, although not represented in the receiving state by a diplomatic mission, has another consular post in the territory of that state, that consular post may be entrusted with the custody of the premises of the consular post which has been closed, together with the property contained therein and the consular archives, and, with the consent of the receiving state, with the exercise of consular functions in the district of that consular post<sup>8</sup>. However, if the sending state has no diplomatic mission and no other consular post in the receiving state, heads (2) and (3) above apply in addition to head (1)<sup>9</sup>.

1 Consular Relations Act 1968 s 1(1), Sch 1 art 27 para 1 (Sch 1 art 27 added by the Diplomatic and Consular Premises Act 1987 s 6, Sch 2 para 4).

2 As to the meaning of 'consular premises' see PARA 293 note 1.

3 As to the meaning of 'consular post' see PARA 292 note 4.

4 Consular Relations Act 1968 Sch 1 art 27 para 1(a) (as added: see note 1). As to the meaning of 'consular archives' see PARA 293 note 8.

5 Consular Relations Act 1968 Sch 1 art 27 para 1(b) (as added: see note 1).

6 Consular Relations Act 1968 Sch 1 art 27 para 1(c) (as added: see note 1).

7 Consular Relations Act 1968 Sch 1 art 27 para 2 (as added: see note 1).

8 Consular Relations Act 1968 Sch 1 art 27 para 2(a) (as added: see note 1).

9 Consular Relations Act 1968 Sch 1 art 27 para 2(b) (as added: see note 1).

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## 295. Freedom of movement and communication.

Members of a consular post<sup>1</sup> are to be guaranteed freedom of movement and travel<sup>2</sup>. The United Kingdom must also protect the freedom of communication on the part of the consular post for all official purposes<sup>3</sup>. Freedom of communication includes the right to use diplomatic or consular couriers<sup>4</sup>, and diplomatic or consular bags<sup>5</sup>, and to send coded messages<sup>6</sup>. In the performance of their functions, consular couriers must be protected by the United Kingdom: they enjoy personal inviolability and are not liable to any form of arrest or detention<sup>7</sup>.

Consular bags may not be opened or detained unless the authorities of the United Kingdom have serious reason to believe that they are being used for other than official purposes<sup>8</sup>.

1 'Members of the consular post' means consular officers, consular employees and members of the service staff: Consular Relations Act 1968 s 1(1), Sch 1 art 1 para 1(g). 'Consular employee' means any person employed in the administrative or technical service of a consular post; and 'member of the service staff' means any person employed in the domestic service of a consular post: Sch 1 art 1 para 1(e), (f). As to the meaning of 'consular officer' see PARA 292 note 5. As to the meaning of 'consular post' see PARA 292 note 4.

2 Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219) art 34. This is expressed to be subject to the laws of the receiving state concerning security zones. As to the Convention see generally PARA 290 note 1. As to the provisions of the Convention given force of law in the United Kingdom see PARA 290 text and note 2.

3 Consular Relations Act 1968 Sch 1 art 35 para 1. The Vienna Convention on Consular Relations art 36 further requires protection of the freedom to communicate with and visit nationals of the sending state who are in prison or otherwise detained. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

4 The consular courier must be provided with an official document indicating his status and the number of packages constituting the consular bag; except with the consent of the United Kingdom, he must be neither a national of the United Kingdom, nor, unless he is a national of the sending state, a permanent resident of the United Kingdom: Consular Relations Act 1968 Sch 1 art 35 para 5. Consular couriers may be designated ad hoc: Sch 1 art 35 para 6. See further note 7.

5 The packages constituting the consular bag must bear visible external marks of their character and may contain only official correspondence and documents or articles intended exclusively for official use: Consular Relations Act 1968 Sch 1 art 35 para 4. As to the meaning of 'official correspondence' see PARA 293 note 9. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorised port of entry, from whom a member of the consular post may receive possession of the bag directly and freely: see Sch 1 art 35 para 7. The captain of such an aircraft is not, however, a consular courier: Sch 1 art 35 para 7.

6 See the Consular Relations Act 1968 Sch 1 art 35 para 1. A wireless transmitter may only be installed with the consent of the United Kingdom: Sch 1 art 35 para 1.

7 Consular Relations Act 1968 Sch 1 art 35 para 5. Where a consular courier is designated ad hoc, Sch 1 art 35 para 5 also applies except that the immunities therein mentioned cease to apply when such a courier has delivered to the consignee the consular bag in his charge: Sch 1 art 35 para 6.

8 See the Consular Relations Act 1968 Sch 1 art 35 para 3. Cf the provisions relating to the diplomatic bag set out in PARA 268. If a request by the authorities (see PARA 293 note 2) that the consular bag be opened is refused, the bag must be returned to its place of origin: Sch 1 art 35 para 3.



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## **296. Privileges and immunities of consular officers.**

Consular officers<sup>1</sup> are not liable to arrest or detention pending trial except in case of a grave crime<sup>2</sup> and pursuant to a decision of the competent judicial authority<sup>3</sup>. In any other case they may not be committed to prison or be restricted in their personal freedom save in execution of a judicial decision of final effect<sup>4</sup>.

Consular officers and employees<sup>5</sup> are not amenable to the jurisdiction of the United Kingdom courts in respect of acts performed in the exercise of their functions<sup>6</sup>, except in respect of a civil action (1) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending state<sup>7</sup>; or (2) by a third party arising from an accident caused by a motor vehicle, vessel or aircraft<sup>8</sup>. The members of the consular post<sup>9</sup> may be called upon to give evidence<sup>10</sup>, although they may refuse to give evidence concerning matters connected with the exercise of their functions<sup>11</sup>, or to produce official documents and correspondence, and may also decline to give evidence as expert witnesses with regard to the law of their sending state<sup>12</sup>.

The sending state may waive any of the privileges and immunities described above<sup>13</sup> provided the waiver is express, but initiation of proceedings by a consular officer precludes him from invoking immunity in respect of any counterclaim directly connected with the principal claim<sup>14</sup>.

1 As to the meaning of 'consular officer' see PARA 292 note 5. The State Immunity Act 1978 Pt I (ss 1-17) (see PARA 244 et seq) does not affect any immunity or privilege conferred by the Consular Relations Act 1968: State Immunity Act 1978 s 16(1). These provisions apply to career consular officers: see PARA 297.

2 'Grave crime' means any offence punishable on first conviction with imprisonment for at least five years: Consular Relations Act 1968 s 1(2).

3 Consular Relations Act 1968 s 1(1), Sch 1 art 41 para 1. Consular officers must be treated with due respect and appropriate measures must be taken to prevent any attack on their person, freedom or dignity: Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219) art 40. See *Aziz v Aziz (Sultan of Brunei intervening)* [2007] EWCA Civ 712, [2008] 2 All ER 501, [2007] NLJR 1047; and PARA 273 note 3. As to notification in case of arrest, detention or prosecution see art 42. As to the provisions of the Convention given force of law in the United Kingdom see PARA 290 text and note 2.

4 Consular Relations Act 1968 Sch 1 art 41 para 2.

5 As to the meaning of 'consular employee' see PARA 295 note 1.

6 Consular Relations Act 1968 Sch 1 art 43 para 1. As to consular functions see PARA 292.

7 Consular Relations Act 1968 Sch 1 art 43 para 2(a).

8 Consular Relations Act 1968 Sch 1 art 43 para 2(b). Consular officers must comply with the laws of the receiving state concerning insurance against third party risks: Vienna Convention on Consular Relations art 56.

9 As to the meaning of 'members of the consular post' see PARA 295 note 1.

10 Consular Relations Act 1968 Sch 1 art 44 para 1. A consular employee or member of the service staff may not refuse to give evidence except in the case referred to in the text to note 12; and if a consular officer declines to give evidence, no coercive measure or penalty may be applied to him: Sch 1 art 44 para 1. The authority requiring the officer's evidence must avoid interference with his functions and may, when possible, take evidence at his residence or consular post or accept a written statement: Sch 1 art 44 para 2. As to the meaning of 'member of the service staff' see PARA 295 note 1.

11 The references to matters connected with the exercise of the functions of members of a consular post must be construed as references to matters connected with the exercise of consular functions by consular officers or consular employees: Consular Relations Act 1968 s 1(4).

12 Consular Relations Act 1968 Sch 1 art 44 para 3.

13 Ie in the Consular Relations Act 1968 Sch 1 arts 41, 43, 44.

14 Consular Relations Act 1968 Sch 1 art 45 paras 1-3. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings does not imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver is necessary: Sch 1 art 45 para 4. For the purposes of Sch 1 art 45, and of Sch 1 art 45 as applied by Sch 1 art 58, a waiver is deemed to have been expressed by a state if it had been expressed by the head, or any person for the time being performing the functions of head, of the diplomatic mission of that state or, if there is no such mission, of the consular post concerned: s 1(5).

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## **297. Persons entitled to privileges, immunities and exemptions.**

Specified facilities, privileges and exemptions<sup>1</sup> apply generally in the case of consular posts headed by career consular officers<sup>2</sup>. They are not accorded to consular employees or members of the service staff who carry on a private gainful occupation in the United Kingdom or members of their families<sup>3</sup>.

In the case of posts headed by honorary consular officers, only certain facilities, privileges and immunities are accorded<sup>4</sup>; these include exemption from taxation generally of consular premises<sup>5</sup>, inviolability of consular archives and documents<sup>6</sup>, exemption from customs duties<sup>7</sup>, taxation<sup>8</sup> and liability to service<sup>9</sup>. Consular officers who are nationals of or permanently resident in the United Kingdom enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and from the giving of evidence of matters connected therewith<sup>10</sup>. Other members of the consular post and their families and private staff<sup>11</sup> who are such nationals or permanent residents enjoy only such facilities, privileges and immunities as the United Kingdom specially grants to them<sup>12</sup>.

If in any proceedings any question arises whether or not any person is entitled to any privilege or immunity under the Consular Relations Act 1968, a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question is conclusive evidence of that fact<sup>13</sup>.

1     I.e. those specified in the Consular Relations Act 1968 s 1(1), Sch 1 Ch II Section II (arts 41-57): s 1(9), Sch 1 art 1 para 2. See PARAS 296, 298-300.

2     Consular Relations Act 1968 Sch 1 art 1 para 2. As to career consular officers see PARA 292 note 5.

3     Consular Relations Act 1968 Sch 1 art 57 para 2. As to the meanings of 'consular employee' and 'member of the service staff' see PARA 295 note 1. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

4     See the Consular Relations Act 1968 Sch 1 art 58. As to honorary consular officers see PARA 292 note 5. As to protection of the consular premises of a consular post headed by an honorary consular officer see Sch 1 art 59 (added by the Diplomatic and Consular Premises Act 1987 s 6, Sch 2 para 6); and PARA 296 note 14. See also Satow's Diplomatic Practice (6th Edn, 2009) p 272.

5     Consular Relations Act 1968 Sch 1 art 60. As to the meaning of 'consular premises' see PARA 293 note 1.

6     Consular Relations Act 1968 Sch 1 art 61. As to the meaning of 'consular archives' see PARA 293 note 8.

7     Consular Relations Act 1968 Sch 1 art 62. See also s 8(1) (amended by the Diplomatic and other Privileges Act 1971 s 4(2)(b); the Customs and Excise Management Act 1979 s 177(1), Sch 4 para 12, Table Pt I; and the Finance (No 2) Act 1992 s 14, Sch 3 para 89). The reference to customs duties must be construed as including references to excise duties chargeable on goods imported into the United Kingdom and to value added tax charged in accordance with the Value Added Tax Act 1994 s 10 or s 15 (acquisitions from other member states and importations from outside the European Union) (see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARAS 19, 113); Consular Relations Act 1968 s 1(8A) (added by the Customs and Excise Management Act 1979 Sch 4 para 6; the Finance (No 2) Act 1992 Sch 3 para 89; and the Value Added Tax Act 1994 s 100(1), Sch 14 para 3).

8     Consular Relations Act 1968 Sch 1 art 66.

9     Consular Relations Act 1968 Sch 1 art 67.

10    Consular Relations Act 1968 s 1(2), Sch 1 art 44 para 3 (see PARA 296) art 71 para 1.

11 'Member of private staff' means a person who is employed exclusively in the private service of a member of the consular post: Consular Relations Act 1968 Sch 1 art 1 para 1(i). As to the meaning of 'consular post' see PARA 295 note 1.

12 Consular Relations Act 1968 Sch 1 arts 1 para 3, 71 para 2. These additional privileges and immunities are such as may be specified by Order in Council: ss 1(11), 14. At the date at which this volume states the law no such order had been made.

13 Consular Relations Act 1968 s 11. As to the Secretary of State see PARA 29.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(7) CONSULAR PRIVILEGES AND IMMUNITIES/298. Exemptions.

## 298. Exemptions.

Members of the consular post<sup>1</sup>, members of their families forming part of their households and, members of the private staff<sup>2</sup> in their sole employ, are exempt from social security provisions<sup>3</sup>. However, this does not preclude voluntary participation in the social security system of the United Kingdom, where such participation is permitted by the United Kingdom<sup>4</sup>.

Consular officers<sup>5</sup> and employees<sup>6</sup> and members of their families forming part of their households are exempt from all dues and taxes, apart from certain indirect taxes<sup>7</sup>. Members of the service staff<sup>8</sup> are exempt from dues and taxes on the wages they receive for their services<sup>9</sup>. Various articles for official and personal use of the consular post<sup>10</sup> and consular officers and members of their families are exempt from customs duties and inspection<sup>11</sup>. The estates of a member of a consular post and his family are not liable to inheritance tax in respect of certain movable property<sup>12</sup>. Members of the consular post and their families are exempt from personal services, public service and military obligations<sup>13</sup>.

The Treasury may authorise the Secretary of State or the Commissioners of Customs and Excise to make, if he or they think fit, arrangements for securing the refund of duty<sup>14</sup> (whether of customs or excise) paid on imported hydrocarbon oil<sup>15</sup> or value added tax paid on the importation or acquisition from another member state of such oil which is (1) bought in the United Kingdom; and (2) used for a purpose that, had it been imported for that use, exemption from duty would have been required to be granted by Order in Council<sup>16</sup> by virtue of the provisions referred to above in relation to exemption from duty<sup>17</sup>.

1 As to the meaning of 'members of the consular post' see PARA 295 note 1.

2 As to the meaning of 'member of the private staff' see PARA 297 note 11. This exemption applies to members of the private staff in sole employ provided they are not nationals of, or permanently resident in, the United Kingdom and Colonies, and provided they are covered by social security provisions in the sending state or a third state: Consular Relations Act 1968 s 1(1), Sch 1 art 48 para 2. Members of the consular post who employ persons to whom this exemption does not apply must observe the obligations which the social security provisions of the United Kingdom imposes upon employers: Sch 1 art 48 para 3. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 Consular Relations Act 1968 Sch 1 art 48 para 1. This provision does not affect any agreement between the United Kingdom and any other state made before 1 January 1971 (the date of commencement of the Act: see PARA 290 note 3), and does not prevent agreements being made after that date: s 1(7). The exemption granted by Sch 1 art 48 with respect to any services is deemed to except those services from any class of employment in respect of which contributions or premiums are payable under the enactments relating to social security (see **SOCIAL SECURITY AND PENSIONS**), including enactments in force in Northern Ireland, but not so as to render any person liable to any contribution or premium which he would not be required to pay if those services were not so excepted: s 1(6) (amended by the Social Security Act 1973 ss 100, 101, Sch 27 para 78; and the Social Security (Consequential Provisions) Act 1975 ss 1(2), 5, Sch 1 Pt I).

4 Consular Relations Act 1968 Sch 1 art 48 para 4. See further **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 470.

5 As to the meaning of 'consular officer' see PARA 292 note 5.

6 As to the meaning of 'consular employee' see PARA 295 note 1.

7 See the Consular Relations Act 1968 Sch 1 art 49 para 1. The exceptions are: (1) indirect taxes of a kind which are normally incorporated in the price of goods or services; (2) dues and taxes on private immovable property situated in the territory of the United Kingdom (subject to Sch 1 art 32 (see PARA 293)); (3) estate,

succession or inheritance duties, and duties on transfers (subject to art 51(b) (see the text and note 12)); (4) dues and taxes on private income having its source in the United Kingdom and capital taxes on investments made in commercial undertakings in the United Kingdom; (5) charges levied for specific services rendered; and (6) registration, court or record fees, mortgage dues and stamp duties (subject to art 32 (see PARA 293)): Sch 1 art 49 para 1(a)-(f).

Members of the consular post who employ persons whose wages or salaries are not exempt from income tax in the United Kingdom must observe the obligations which United Kingdom law imposes upon employers concerning the levying of income tax: Sch 1 art 49 para 3.

8 As to the meaning of 'members of the service staff' see PARA 295 note 1.

9 Consular Relations Act 1968 Sch 1 art 49 para 2. See also Sch 1 art 49 para 3; and note 7.

10 As to the meaning of 'consular post' see PARA 292 note 4.

11 See the Consular Relations Act 1968 s 1(8), Sch 1 art 50 para 1. Consular employees enjoy these privileges and exemptions in respect of articles imported at the time of first installation: Sch 1 art 50 para 2. Personal baggage is exempt from inspection, unless there is serious reason to believe that it contains articles other than those permitted by Sch 1 art 50 para 1, or articles the import or export of which is prohibited by the United Kingdom or which are subject to its quarantine laws; such inspection must be carried out in the presence of the consular officer or member of his family concerned: see Sch 1 para 50 art 3. As to the relief from customs and excise duties for persons enjoying privileges and immunities under the Consular Relations Act 1968 see the Customs and Excise Duties (General Reliefs) Act 1979 ss 13A-13C; and **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARAS 887, 894.

12 See the Consular Relations Act 1968 s 1(8), Sch 1 art 51; and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 610.

13 See the Consular Relations Act 1968 Sch 1 art 52.

14 Any such arrangements may impose conditions subject to which any refund is to be made: Consular Relations Act 1968 s 8(2). Any amount refunded under such arrangements must be defrayed (1) if the arrangements are made by the Secretary of State, out of moneys provided by Parliament; and (2) if the arrangements are made by Commissioners for Her Majesty's Revenue and Customs, out of the moneys standing to the credit of the general account of the Commissioners of Customs and Excise: s 8(3) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50). As to the Secretary of State see PARA 29. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517. As to the Commissioners for Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq.

15 I.e hydrocarbon oil within the meaning of the Hydrocarbon Oil Duties Act 1979: see **CUSTOMS AND EXCISE** vol 12(2) (2007 Reissue) PARA 510.

16 I.e by Order in Council under the Consular Relations Act 1968 s 3(1): see PARA 301. This also extends to an order under s 12 (see PARA 302): s 12(1) (substituted by the Diplomatic and other Privileges Act 1971 s 4(1), Schedule).

17 Consular Relations Act 1968 s 8(1) (amended by the Diplomatic and other Privileges Act 1971 s 4(2)(b); the Customs and Excise Management Act 1979 s 177(1), Sch 4 para 12, Table Pt I; and the Finance (No 2) Act 1992 s 14, Sch 3 para 89).

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## **299. Duration of privileges and immunities.**

A member of a consular post<sup>1</sup> enjoys his privileges and immunities from the moment he enters the United Kingdom on proceeding to take up his post or, if already there, from the moment he enters on his duties<sup>2</sup>. They end when he leaves the country or on the expiry of a reasonable period in which to do so, but they subsist until then even in case of an armed conflict<sup>3</sup>. With respect to acts performed by a consular officer<sup>4</sup> in the exercise of his functions, immunity from jurisdiction continues to subsist without limitation of time<sup>5</sup>.

1 As to the meaning of 'members of the consular post' see PARA 295 note 1.

2 Consular Relations Act 1968 s 1(1), Sch 1 art 53 para 1. Members of his family forming part of his household and members of his private staff enjoy their immunities from the date on which the member of the family or private staff, whichever is the latest: Sch 1 art 53 para 2. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 Consular Relations Act 1968 Sch 1 art 53 para 3. The privileges and immunities of the family and staff of a consular officer come to an end when they cease to belong to the household or staff, but if such member intends to leave the United Kingdom within a reasonable period the privileges subsist until departure: Sch 1 art 53 para 3. If a consular officer dies, the members of his family forming part of his household continue to enjoy the privileges and immunities until they leave the United Kingdom or, if it occurs sooner, until a reasonable period of time enabling them to do so expires: Sch 1 art 53 para 5.

4 As to the meaning of 'consular officer' see PARA 292 note 5.

5 Consular Relations Act 1968 Sch 1 art 53 para 4. As to the functions of a consular officer see PARA 292.

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### **300. Persons passing through the United Kingdom.**

Consular officers<sup>1</sup> passing through the United Kingdom on their way between the sending state and their posts are entitled to such immunities as may be required to ensure their transit or return<sup>2</sup>. These obligations also extend towards such persons, correspondence and official communications, couriers and consular bags in transit or whose presence in the United Kingdom is due to force majeure<sup>3</sup>.

1 As to the meaning of 'consular officer' see PARA 292 note 5.

2 See the Consular Relations Act 1968 s 1(1), Sch 1 art 54 para 1. Similar provisions apply to members of the family of consular officers forming part of his household (whether travelling with him or travelling separately to join him), other members of the consular post and their families and official correspondence and communications: see Sch 1 art 54 paras 2, 3. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 See the Consular Relations Act 1968 s 1(8), Sch 1 art 54 para 4.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(7) CONSULAR PRIVILEGES AND IMMUNITIES/301. Reciprocal withdrawal and extension of privileges.

### **301. Reciprocal withdrawal and extension of privileges.**

Where the privileges and immunities contained in the Consular Relations Act 1968 are greater than those accorded to a consular post<sup>1</sup> of the United Kingdom in a territory of any state or to persons connected with such consular post, they may be withdrawn by Order in Council<sup>2</sup>. Where, by any agreement made between the United Kingdom and any other state, additional or reduced privileges and immunities relative to those accorded by the Act are provided for, effect may be given to such agreement by Order in Council<sup>3</sup>.

1 As to the meaning of 'consular post' see PARA 30 note 1.

2 See the Consular Relations Act 1968 ss 2, 14. At the date at which this volume states the law no such orders had been made. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 See the Consular Relations Act 1968 ss 3, 14. Such agreements are envisaged by the Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219) art 73. The following Orders in Council have been made giving effect to such agreements: the Consular Relations (Privileges and Immunities) (Republic of Austria) Order 1970, SI 1970/1921; the Consular Relations (Privileges and Immunities) (Kingdom of Belgium) Order 1970, SI 1970/1922; the Consular Relations (Privileges and Immunities) (People's Republic of Bulgaria) Order 1970, SI 1970/1923; the Consular Relations (Privileges and Immunities) (People's Republic of China) Order 1984, SI 1984/1978; the Consular Relations (Privileges and Immunities) (Kingdom of Denmark) Order 1970, SI 1970/1924; the Consular Relations (Privileges and Immunities) (French Republic) Order 1970, SI 1970/1925; the Consular Relations (Privileges and Immunities) (Federal Republic of Germany) Order 1970, SI 1970/1926; the Consular Relations (Privileges and Immunities) (Kingdom of Greece) Order 1970, SI 1970/1927; the Consular Relations (Privileges and Immunities) (Italian Republic) Order 1970, SI 1970/1928; the Consular Relations (Privileges and Immunities) (Japan) Order 1970, SI 1970/1929; the Consular Relations (Privileges and Immunities) (United States of Mexico) Order 1970, SI 1970/1930; the Consular Relations (Privileges and Immunities) (Kingdom of the Netherlands) Order 1970, SI 1970/1931; the Consular Relations (Privileges and Immunities) (Kingdom of Norway) Order 1970, SI 1970/1932; the Consular Relations (Privileges and Immunities) (Socialist Republic of Romania) Order 1970, SI 1970/1934; the Consular Relations (Privileges and Immunities) (Spanish State) Order 1970, SI 1970/1935; the Consular Relations (Privileges and Immunities) (Kingdom of Sweden) Order 1970, SI 1970/1936; the Consular Relations (Privileges and Immunities) (United States of America) Order 1970, SI 1970/1937; the Consular Relations (Privileges and Immunities) (Union of Soviet Socialist Republics) Order 1970, SI 1970/1938; the Consular Relations (Privileges and Immunities) (Socialist Federal Republic of Yugoslavia) Order 1970, SI 1970/1939; the Consular Relations (Privileges and Immunities) (Polish People's Republic) Order 1978, SI 1978/1028; and the Consular Relations (Privileges and Immunities) (People's Republic of China) Order 1984, SI 1984/1978.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(7) CONSULAR PRIVILEGES AND IMMUNITIES/302. Representatives of members of the Commonwealth and the Republic of Ireland.

**302. Representatives of members of the Commonwealth and the Republic of Ireland.**

In relation to certain Commonwealth representatives, Her Majesty may provide by Order in Council for conferring all or any of the privileges and immunities<sup>1</sup> which are conferred or may be conferred on consular posts and persons connected with consular posts<sup>2</sup>.

The Commonwealth representatives concerned are persons in the service of the government of any country within the Commonwealth who hold offices appearing to Her Majesty to involve the performance of duties substantially corresponding to those which, in the case of a foreign sovereign power, would be performed by a consular officer<sup>3</sup>, and any person for the time being recognised by the United Kingdom government as the chief representative in the United Kingdom of a state or province of a country within the Commonwealth<sup>4</sup>.

These provisions have effect in relation to persons in the service of the government of the Republic of Ireland as they have effect in relation to persons in the service of the government of a country within the Commonwealth<sup>5</sup>.

1 See PARAS 295-299.

2 Consular Relations Act 1968 s 12(1) (s 12 substituted by the Diplomatic and other Privileges Act 1971 s 4, Schedule). The privileges and immunities which may be conferred include those which in other cases may, if an agreement so requires, be conferred by virtue of the Consular Relations Act 1968 Sch 2: s 12(3) (as so substituted). See the Commonwealth Countries and Republic of Ireland (Immunities and Privileges) Order 1985, SI 1985/1983 (amended by SI 2005/246; SI 2006/309; SI 2009/1741). As to the Commonwealth see **COMMONWEALTH** vol 13 (2009) PARA 701.

3 Consular Relations Act 1968 s 12(2)(a) (as substituted: see note 2).

4 Consular Relations Act 1968 s 12(2)(b) (as substituted: see note 2). As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

5 Consular Relations Act 1968 s 12(4) (as substituted: see note 2). See also PARA 298 note 16.

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### **303. Consuls' powers in relation to property, ships and aircraft.**

Certain powers relating to the administration of the estates and property of deceased persons may be conferred upon consular officers of foreign states with which consular conventions have been concluded by the Crown<sup>1</sup>. If a national of a state to which the Consular Conventions Act 1949 has been applied by Order in Council is entitled to a grant of probate or administration in respect of property in England or Wales and the court is satisfied, on application by a consular officer of that state, that the person in question is not resident in England or Wales and has not by attorney applied for a grant, the court must make a grant to that officer<sup>2</sup>. Such a grant of administration is made to the consular officer by his official title and the powers and duties conferred on him as administrator are vested in his successor without further grant<sup>3</sup>.

Similarly, where such a national is entitled to money or property as a result of another person's death and the national is not resident in England or Wales, the consular officer may receive the money or property as though he were authorised by power of attorney<sup>4</sup>.

A consular officer is not, however, entitled to any immunity or privilege in respect of any act done by virtue of the powers conferred on him in this regard or in respect of any document for the time being in his possession which relates to it<sup>5</sup>.

A consular officer of a foreign state also has certain powers in respect of ships and aircraft if the appropriate statutory powers have been applied by Order in Council to that state. Such an Order in Council, which may specify the circumstances in which ships and aircraft are to be treated as belonging to the state concerned<sup>6</sup>, may (1) exclude or limit the jurisdiction of a United Kingdom court to hear proceedings relating to the remuneration or contract of service of the master or commander or a crew member of a ship or aircraft of that state except where a consular officer of that state has been notified and has not objected to the invoking of the jurisdiction<sup>7</sup>; and (2) secure that where an offence is alleged to have been committed on board a ship belonging to that state by the master or a crew member, proceedings for the offence will not be entertained by a United Kingdom court otherwise than at the request or with the consent of a consular officer of that state unless certain conditions<sup>8</sup> are satisfied<sup>9</sup>.

1 See the Consular Conventions Act 1949 s 1. Her Majesty may by Order in Council direct that ss 1, 2 are to apply to any foreign state specified in the Order, being a state with which a consular convention providing for such matters has been concluded: Consular Conventions Act 1949 s 6(1) (amended by the Consular Relations Act 1968 s 16(3), (4)). Any such Order in Council may be revoked by a subsequent order: Consular Conventions Act 1949 s 6(2). Any such Order in Council must be laid before Parliament after being made: s 6(3).

The following Orders in Council have been made under these provisions, in consequence of consular conventions made with the states in question: the Consular Conventions (Kingdom of Norway) Order in Council 1951, SI 1951/1165; the Consular Conventions (Kingdom of Sweden) Order 1952, SI 1952/1218; the Consular Conventions (United States of America) Order 1952, SI 1952/1416; the Consular Conventions (Kingdom of Greece) Order 1953, SI 1953/1454; the Consular Conventions (French Republic) Order 1953, SI 1953/1455; the Consular Conventions (United States of Mexico) Order 1955, SI 1955/425; the Consular Conventions (Federal Republic of Germany) Order 1957, SI 1957/2052; the Consular Conventions (Italian Republic) Order 1957, SI 1957/2053; the Consular Conventions (Kingdom of Denmark) Order 1963, SI 1963/370; the Consular Conventions (Spanish State) Order 1963, SI 1963/614; the Consular Conventions (Republic of Austria) Order 1963, SI 1963/1927; the Consular Conventions (Kingdom of Belgium) Order 1964, SI 1964/1399; the Consular Conventions (Japan) Order 1965, SI 1965/1714; the Consular Conventions (Socialist Federal Republic of Yugoslavia) Order 1966, SI 1966/443; the Consular Conventions (Union of Soviet Socialist Republics) Order 1968, SI 1968/1378; the Consular Conventions (People's Republic of Bulgaria) Order 1968, SI 1968/1861; the Consular Conventions (Polish People's Republic) Order 1971, SI 1971/1238; the Consular Conventions (Hungarian People's Republic) Order 1971, SI 1971/1845; the Consular Conventions (Mongolian People's

Republic) Order 1976, SI 1976/1150; the Consular Conventions (Czechoslovak Socialist Republic) Order 1976, SI 1976/1216; the Consular Conventions (Arab Republic of Egypt) Order 1986, SI 1986/216.

In addition, orders in respect of the following states, made under the Domicile Act 1861 s 4 (repealed), continue in force by virtue of the Consular Conventions Act 1949 s 8: the Administration of Estates by Consular Officers (Finland) Order in Council 1939, SR & O 1939/1452; the Administration of Estates by Consular Officers (Thailand) Order in Council 1939, SR & O 1939/1457; and the Administration of Estates by Consular Officers (Turkey) Order in Council 1939, SR & O 1939/1458.

2 Consular Conventions Act 1949 s 1(1). The grant may be postponed in appropriate circumstances: s 1(1) proviso. Notwithstanding anything in the Senior Courts Act 1981 s 114(1) (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 161), administration of an estate may in any case be granted to a consular officer alone under the Consular Conventions Act 1949 s 1; the Senior Courts Act 1981 s 114(2) does not apply in such a case: Consular Conventions Act 1949 s 1(4) (amended by virtue of the Senior Courts Act 1981 s 152(1), Sch 5).

3 See the Consular Conventions Act 1949 s 1(3) (amended by the Administration of Estates Act 1971 s 12, Sch 2). This provision does not affect any limitation in the grant or any power of the court to revoke the grant: Consular Conventions Act 1949 s 1(3) proviso.

4 See the Consular Conventions Act 1949 s 1(2). No one may pay or deliver to the consular officer if he knows any other person in England has been expressly authorised to receive the property or money on behalf of the national: s 1(2) proviso.

5 Consular Conventions Act 1949 s 3.

6 Consular Relations Act 1968 s 16(2). The following Orders in Council have been made partly under s 16(2): the Republic of Austria (Consular Relations (Merchant Shipping) (Republic of Austria) Order 1970, SI 1970/1903; the Consular Relations (Merchant Shipping) (Kingdom of Belgium) Order 1970, SI 1970/1904; the Consular Relations (Merchant Shipping) (Kingdom of Denmark) Order 1970, SI 1970/1905; the Consular Relations (Merchant Shipping) (French Republic) Order 1970, SI 1970/1906; the Consular Relations (Merchant Shipping) (Federal Republic of Germany) Order 1970, SI 1970/1907; the Consular Relations (Merchant Shipping) (Kingdom of Greece) Order 1970, SI 1970/1908; the Consular Relations (Merchant Shipping) (Italian Republic) Order 1970, SI 1970/1909; the Consular Relations (Merchant Shipping) (Japan) Order 1970, SI 1970/1910; the Consular Relations (Merchant Shipping) (United States of Mexico) Order 1970, SI 1970/1911; the Consular Relations (Merchant Shipping) (Kingdom of Norway) Order 1970, SI 1970/1912; the Consular Relations (Merchant Shipping) (Spanish State) Order 1970, SI 1970/1913; the Consular Relations (Merchant Shipping) (Kingdom of Sweden) Order 1970, SI 1970/1914; the Consular Relations (Merchant Shipping) (United States of America) Order 1970, SI 1970/1915; the Consular Relations (Merchant Shipping) (Socialist Federal Republic of Yugoslavia) Order 1970, SI 1970/1917; the Consular Relations (Merchant Shipping and Civil Aviation) (People's Republic of Bulgaria) Order 1970, SI 1970/1918; the Consular Relations (Merchant Shipping and Civil Aviation) (Socialist Republic of Romania) Order 1970, SI 1970/1920; the Consular Relations (Merchant Shipping and Civil Aviation) (Hungarian People's Republic) Order 1970, SI 1971/1846; the Consular Relations (Merchant Shipping and Civil Aviation) (Czechoslovak Socialist Republic) Order 1976, SI 1976/768; the Consular Relations (Merchant Shipping and Civil Aviation) (German Democratic Republic) Order 1976, SI 1976/1152; the Consular Relations (Merchant Shipping and Civil Aviation) (Polish People's Republic) Order 1978, SI 1978/275; the Consular Relations (Merchant Shipping and Civil Aviation) (Arab Republic of Egypt) Order 1986 SI 1986/217.

The orders in respect of Austria, Belgium, Czechoslovakia, Denmark, German Democratic Republic, German Federal Republic, Hungary, Italy, Japan, Spain, and Yugoslavia are also made under the Consular Relations Act 1968 ss 4-6 (see the text and notes 7-9); the orders in respect of Greece, Mexico, Norway and Sweden are also made under ss 4, 6; the orders in respect of Bulgaria, Egypt, Poland and Romania are also made under s 4; and the orders in respect of France and the United States of America are also made under s 6.

7 Consular Relations Act 1968 s 4. For orders made under this provision see note 6. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

8 (1) the offence is alleged to have been committed by or against a citizen of the United Kingdom and Colonies or is otherwise a national of the receiving state or against a person other than the master or a crew member; or (2) the offence involves the tranquillity or safety of a port, or the law relating to safety of life at sea, public health, oil pollution, wireless telegraphy, immigration or customs, or is of any other description specified in the order; or (3) the offence is a grave crime: Consular Relations Act 1968 s 5(1)(a)-(c). 'National of the receiving state' means (a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas Citizen; or (b) a person who under the British Nationality Act 1981 is a British subject; or (c) a British protected person, within the meaning of that Act (see generally **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**): Consular Relations Act 1968 s 1(2) (definition amended by the British Nationality Act 1981 s 52(6), Sch 7; the British Overseas Territories Act 2002 s 2(3); and SI 1986/948). As to the meaning of 'grave crime' see PARA 296 note 2. 'The law relating to customs', to the extent that it here refers to duties, refers to the law relating to duties (whether customs or excise) chargeable on goods imported into the United Kingdom: s 5(1A)

(added by the Customs and Excise Management Act 1979 s 177(1), Sch 4 para 7). As to the expression 'United Kingdom and Colonies' see PARA 274 note 8.

9 Consular Relations Act 1968 s 5(1). For orders made under this provision see note 6. An offence affecting a person's property is deemed to have been committed against him: s 5(2). A document purporting to be signed by or on behalf of a consular officer and stating that he has requested or consented to the institution of proceedings is sufficient proof of that fact unless the contrary is proved: s 5(3).

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## **(8) INSTITUTIONS OF THE EUROPEAN UNION**

### **304. Privileges and immunities afforded to European institutions.**

The European Union (EU) and the European Atomic Energy Community (EAEC) enjoy in the territories of the member states such privileges and immunities as are necessary for the performance of their tasks, subject to conditions<sup>1</sup>. These privileges extend also to the European Investment Bank and the European Central Bank<sup>2</sup>.

The premises and buildings of the EU are inviolable. They are exempt from search, requisition, confiscation and expropriation. EU property and assets may not be the subject of any administrative or legal measure of constraint without the authorisation of the European Court of Justice<sup>3</sup>. The EU's archives are inviolable<sup>4</sup>.

The EU, its assets, revenues and other property are exempt from all direct taxes. The governments of the member states must, wherever possible, take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes included in the price of movable or immovable property, where the EU makes, for its official use, substantial purchases the price of which includes taxes of this kind. These provisions must not be applied, however, so as to have the effect of distorting competition within the EU<sup>5</sup>.

The EU is exempt from all customs duties, prohibitions and restrictions on imports and exports in respect of articles intended for its official use; articles so imported must not be disposed of, whether or not in return for payment, in the territory of the country into which they have been imported, except under conditions approved by the government of that country. The EU is also exempt from any customs duties and any prohibitions and restrictions on imports and exports in respect of its publications<sup>6</sup>.

For their official communications and the transmission of all their documents, the institutions of the EU enjoy in the territory of each member state the treatment accorded by that state to diplomatic missions. Official correspondence and other official communications of the institutions of the EU are not subject to censorship<sup>7</sup>.

The member state in whose territory the EU has its seat must accord the customary diplomatic immunities and privileges to missions of third countries accredited to the EU<sup>8</sup>.

<sup>1</sup> Treaty on the Functioning of the European Union art 343 (formerly art 291 of the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179), which was renamed and renumbered by the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (Lisbon, 13 December 2007; ECS 13 (2007); Cm 7294) (OJ C306, 17.12.2007, p 1); see the consolidated text of the EU Treaties (OJ C115, 9.5.2008, p 194). See also Protocol (No 2) Amending the Treaty Establishing the European Atomic Energy Community (which is annexed to the Treaty of Lisbon, which entered into force on 1 December 2009). The European Union (Amendment) Act 2008 enables the United Kingdom to ratify the treaty. The details of the privileges and immunities are set out in the Protocol on the Privileges and Immunities of the European Union (Brussels, 8 April 1965; TS 1 (1973); Cmnd 5179) (as amended by Protocol (No 1) to the Lisbon Treaty). The institutions of the European Union are required to co-operate with the responsible authorities of the member states for the purpose of applying the Protocol: art 18. See Case C-2/88 *Jl Zwartveld* [1990] ECR-I 3365, [1990] 3 CMLR 457, ECJ.

The European Union is not entitled to foreign sovereign immunity: *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72 at 196-203, sub nom *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1988] 3 All ER 257 at 316-320, CA.

The Protocol on the Privileges and Immunities of the European Union may be applied to other designated organisations, eg the European Office for Harmonisation in the Internal Market (see EC Council Regulation 40/94 (OJ L11, 14 January 1994, p 1) art 113); and the Community Plant Variety Office (see EC Council Regulation 2100/94 (OJ L227, 1 September 1994, p 1)).

2 See the Treaty on the Functioning of the European Union art 343 (formerly art 291: see note 1); and the Protocol on the Privileges and Immunities of the European Union arts 21, 22 (art 22 substituted by the Amsterdam Treaty (OJ C340) art 9 para 5; both articles later renumbered by Protocol (No 1) to the Lisbon Treaty: see note 1). The privileges also extended to the European Monetary Institute. As to the liquidation of the European Monetary Institute see the Protocol on the Statute of the European Monetary Institute art 23. For these purposes, references to the European Union should be read as including references to the European Investment Bank and the European Central Bank.

The European Investment Bank and the European Central Bank are additionally exempt from any form of taxation or imposition of a like nature on the occasion of any increase in their capital and from the various formalities which may be connected therewith in the state where they have their seats; similarly, their dissolution or liquidation will not give rise to any imposition; the activities of the Banks and their organs carried on in performance of their functions are not subject to any turnover tax: see the Protocol on the Privileges and Immunities of the European Union arts 21, 21 (as so substituted and renumbered).

3 Protocol on the Privileges and Immunities of the European Union art 1. As to applications under art 1 see Case 1/87 *Universe Tankship Co Inc v EC Commission* [1987] ECR 2807, ECJ.

4 Protocol on the Privileges and Immunities of the European Union art 2.

5 Protocol on the Privileges and Immunities of the European Union art 3. No exemption may be granted in respect of taxes and dues which amount merely to charges for public utility services: art 3. See Case C-437/04 *EC Commission v Belgium* [2008] STC 1563 (failure by the Commission to obtain exemption from landlord of a leased building for direct taxation meant that the Commission, as tenants, were liable to pay tax according to terms of lease).

6 Protocol on the Privileges and Immunities of the European Union art 4.

7 Protocol on the Privileges and Immunities of the European Union art 5 (renumbered by Protocol (No 1) to the Lisbon Treaty: see note 1).

8 Protocol on the Privileges and Immunities of the European Union art 16 (renumbered by Protocol (No 1) to the Lisbon Treaty: see note 1).

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### **305. Members of the European Parliament.**

No administrative or other restriction may be imposed on the free movement of members of the European Parliament travelling to or from the place of meeting of that Parliament<sup>1</sup>.

Members of the European Parliament, in respect of customs and exchange control, must be accorded (1) by their own government, the same facilities as those accorded to senior officials travelling abroad on temporary official missions; (2) by the governments of other member states, the same facilities as those accorded to representatives of foreign governments on temporary official missions<sup>2</sup>.

Members of the European Parliament are not subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties<sup>3</sup>.

During the sessions of the European Parliament, its members enjoy: (a) in the territory of their own state, the immunities accorded to members of their parliament; and (b) in the territory of any other member state, immunity from any measure of detention and from legal proceedings<sup>4</sup>. This immunity likewise applies to members while they are travelling to and from the place of meeting of the European Parliament<sup>5</sup>. However, immunity cannot be claimed when a member is found in the act of committing an offence; and the European Parliament is not prevented from exercising its right to waive the immunity of one of its members<sup>6</sup>.

1 Protocol on the Privileges and Immunities of the European Union (Brussels, 8 April 1965; TS 1 (1973); Cmnd 5179 II) art 7 first para (arts 7, 8, 9 amended by the Single European Act 1986 art 3(1); and renumbered by Protocol (No 1) to the Lisbon Treaty: see PARA 304 note 1).

2 Protocol on the Privileges and Immunities of the European Union art 7 second para (as amended and renumbered: see note 1).

3 Protocol on the Privileges and Immunities of the European Union art 8 (as amended and renumbered: see note 1).

4 Protocol on the Privileges and Immunities of the European Union art 9 first para (as amended and renumbered: see note 1). As to when the European Parliament is in session for these purposes see Case 149/85 *Wybot v Faure* [1986] ECR 2391, [1987] 1 CMLR 819, ECJ.

5 Protocol on the Privileges and Immunities of the European Union art 9 second para (as amended and renumbered: see note 1).

6 Protocol on the Privileges and Immunities of the European Union art 9 third para (as amended and renumbered: see note 1).



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### **306. Representatives, officials and servants.**

Representatives of member states taking part in the work of the institutions of the European Union (EU), their advisers and technical experts, in the performance of their duties and during their travel to and from the place of meeting, enjoy the customary privileges, immunities and facilities<sup>1</sup>.

In the territory of each member state and whatever their nationality, officials and other servants of the EU:

- 51 (1) subject to the provisions of the European law relating, on the one hand, to the rules on the liability of officials and other servants towards the EU and, on the other hand, to the jurisdiction of the Court of Justice in disputes between the EU and its officials and other servants, are immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written<sup>2</sup>;
- 52 (2) together with their spouses and dependent members of their families, are not subject to immigration restrictions or to formalities for the registration of aliens<sup>3</sup>;
- 53 (3) in respect of currency or exchange regulations, must be accorded the same facilities as are customarily accorded to officials of international organisations<sup>4</sup>;
- 54 (4) enjoy the right to import free of duty their furniture and effects at the time of first taking up their post in the country concerned, and the right to re-export free of duty their furniture and effects, on termination of their duties in that country, subject in either case to the conditions considered to be necessary by the government of the country in which this right is exercised<sup>5</sup>;
- 55 (5) have the right to import free of duty a motor car for their personal use, acquired either in the country of their last residence or in the country of which they are nationals on the terms ruling in the home market in that country, and to re-export it free of duty, subject in either case to the conditions considered to be necessary by the government of the country concerned<sup>6</sup>.

Officials and other servants of the EU are liable to a tax for the benefit of the EU on salaries, wages and emoluments paid to them by the EU, but are exempt from national taxes on salaries, wages and emoluments paid by the EU<sup>7</sup>.

Privileges, immunities and facilities must be accorded to officials and other servants of the EU solely in the interests of the EU. Accordingly, each institution of the EU is required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the EU<sup>8</sup>.

The majority of the provisions described above<sup>9</sup> apply to members of the Commission of the European Union<sup>10</sup>, and to the judges, advocates-general, registrar and assistant rapporteurs of the Court of Justice of the European Union<sup>11</sup>.

1 Protocol on the Privileges and Immunities of the European Union (Brussels, 8 April 1965; TS 1 (1973); Cmnd 5179) art 10 first para (articles renumbered by Protocol (No 1) to the Lisbon Treaty: see PARA 304 note 1). This also applies to members of the advisory bodies of the EU: art 10 second para (as so renumbered). The terms 'representative' and 'customary privileges, immunities and facilities' are not defined. Cf, however, PARA 317 for the privileges and immunities accorded to representatives of international organisations; and PARA 292

text and note 8 for the immunities afforded to consular officers. As to the application of these provisions to the financial institutions of the EU see PARA 304 note 2. As to the inadmissibility of an action by an individual regarding the interpretation and application of the Protocol see Case 1/82 *D v Luxembourg* [1982] ECR 3709, ECJ.

2 Protocol on the Privileges and Immunities of the European Union art 11(a) (as renumbered: see note 1). They continue to enjoy this immunity after ceasing to hold office: art 11(a) (as so renumbered). The persons to whom arts 11-13 apply are to be determined by the EC Parliament and Council and their details communicated to the governments of member states: art 15 (as so renumbered).

3 Protocol on the Privileges and Immunities of the European Union art 11(b) (as renumbered: see note 1). See also art 15; and note 2.

4 Protocol on the Privileges and Immunities of the European Union art 11(c) (as renumbered: see note 1). See also art 15; and note 2. As to international organisations see PARA 307.

5 Protocol on the Privileges and Immunities of the European Union art 11(d) (as renumbered: see note 1). See also art 15; and note 2.

6 Protocol on the Privileges and Immunities of the European Union art 11(d). See also art 15; and note 2.

7 Protocol on the Privileges and Immunities of the European Union art 12 (as renumbered: see note 1). See also Case 85/86 *EC Commission v Board of Governors of the European Investment Bank* [1986] ECR 2215, [1989] 1 CMLR 103, ECJ; Case C-333/88 *Tither v IRC* [1990] ECR I-1133, [1990] 2 CMLR 779, ECJ. As to the place deemed to be the country of domicile for tax purposes, and the exemption of movable property from tax and duties, see also the Protocol on the Privileges and Immunities of the European Union art 13 (as renumbered: see note 1). See also art 15; and note 2.

8 Protocol on the Privileges and Immunities of the European Union art 17 (as renumbered: see note 1).

9 See the Protocol on the Privileges and Immunities of the European Union arts 11-14, 17: see the text and notes 2-8.

10 Protocol on the Privileges and Immunities of the European Union art 19 (as renumbered: see note 1).

11 Protocol on the Privileges and Immunities of the European Union art 20 (as renumbered: see note 1), which is expressed to be without prejudice to the immunity from suit enjoyed by the judges and advocates-general under the Statute of the Court of Justice of the European Union.

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## (9) INTERNATIONAL ORGANISATIONS

### 307. Conventions respecting status, immunities and privileges of international organisations.

The United Kingdom is a party to numerous international arrangements providing for the legal status, privileges and immunities of international organisations and persons connected with them<sup>1</sup>. The Charter of the United Nations stipulates that the organisation is to enjoy in the territory of each of the member states such privileges and immunities as are necessary for the fulfilment of its purposes, and that representatives of member states and officials of the organisation are similarly to enjoy such immunities as are necessary for the independent exercise of their functions<sup>2</sup>. In 1946 the General Assembly adopted a Convention on the Privileges and Immunities of the United Nations<sup>3</sup>, which provides for immunity from jurisdiction, inviolability of premises and archives, currency and fiscal privileges, freedom of communications, and privileges and immunities of the organisation's personnel. In 1947 the General Assembly likewise approved a Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations<sup>4</sup>, which is on similar lines. Among other agreements respecting international organisations of which the United Kingdom is a member, under which recognition of the status of the organisation and its privileges and the immunities of its personnel are stipulated<sup>5</sup>, are those concerning the Council of Europe<sup>6</sup>, the European Court of Human Rights<sup>7</sup>, the North Atlantic Treaty Organisation<sup>8</sup> and the European Union and its organs<sup>9</sup>.

1 As to the privileges and immunities of international organisations see PARA 309.

2 Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 105 paras 1, 2. See also Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 19, which provides that members of the court, when engaged on its business, enjoy diplomatic privileges and immunities; and see art 32 para 8, which provides that salaries of judges and officials of the court are to be immune from taxation.

3 I.e. the Convention on the Privileges and Immunities of the United Nations (London, 13 February 1946; TS 10 (1950); Cmd 7891). It is for the Secretary-General to determine whether a particular expert on mission is entitled to immunity under the Convention: *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Request for Advisory Opinion)* ICJ Reports 1998, 423.

4 I.e. the Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations (adopted 21 November 1947; TS 69 (1959); Cmd 855). As to the specialised agencies see PARA 533. The Convention applies with modifications and variations to all the specialised agencies.

5 In addition to the organisations referred to in notes 6-9 see those referred to in PARA 311.

6 General Agreement on Privileges and Immunities of the Council of Europe (Paris, 2 September 1949; TS 34 (1953); Cmd 8852). See also the First Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (Strasbourg, 6 November 1952; TS 17 (1957); Cmd 84); and the Fifth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (Strasbourg, 18 June 1990; TS 96 (1990); Cm 1764).

7 Second Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (Paris, 15 December 1956; TS 50 (1958); Cmd 579) (Commission of Human Rights); Fourth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (Paris, 16 December 1961; TS 58 (1971); Cmd 4739) (European Court of Human Rights).

8 See the Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff (Ottawa, 20 September 1951; TS 11 (1955); Cmd 9383).

9 Protocol on the Privileges and Immunities of the European Union (Brussels, 8 April 1965; TS 1 (1973); Cmd 5179): see *PARA 304 et seq.*

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### **308. Headquarters agreements.**

The United Kingdom has entered into headquarters agreements with certain international organisations which have their headquarters in the United Kingdom. These agreements confer privileges and immunities upon the premises and archives and the personnel attached to the organisation, and secure exemption from direct taxation and customs duties and freedom of communication. The organisations are the International Maritime Organisation<sup>1</sup>, the International Grains Council (formerly the International Wheat Council)<sup>2</sup>, the International Sugar Organisation<sup>3</sup>, the International Coffee Organisation<sup>4</sup>, the International Cocoa Organisation<sup>5</sup>, the International Whaling Commission<sup>6</sup>, the European Centre for Medium-Range Weather Forecasts<sup>7</sup>, the International Lead and Zinc Study Group<sup>8</sup>, CAB International (formerly the Commonwealth Agricultural Bureau)<sup>9</sup>, the North-East Atlantic Fisheries Commission<sup>10</sup>, the International Rubber Study Group<sup>11</sup>, the International Oil Pollution Compensation Fund<sup>12</sup>, the International Maritime Satellite Organisation<sup>13</sup>, the Commonwealth Foundation<sup>14</sup>, the Commonwealth Telecommunication Organisation<sup>15</sup>, the North Atlantic Salmon Conservation Organisation<sup>16</sup>, the European Bank for Reconstruction and Development<sup>17</sup>, the International Oil Pollution Compensation Fund 1992<sup>18</sup>, the International Mobile Satellite Organisation<sup>19</sup>, and INTELSAT<sup>20</sup>.

1 Agreement between the Government of the United Kingdom and the Inter-Governmental Maritime Consultative Organisation (now International Maritime Organisation) regarding the Headquarters of the Organisation (London, 29 November 1968; TS 18 (1969); Cmnd 3964); amended by Exchange of Notes (London, 28 October to 1 November 1971; TS 25 (1972); Cmnd 4917); by Exchange of Notes (London, 13 to 25 February 1974; TS 133 (1975); Cmnd 6340); by Exchange of Notes (London, 20 January 1982; TS 30 (1982); Cmnd 8623); by Exchange of Notes (London, 19 August to 23 October 1997; TS 17 (2000); Cm 4634); and by Exchange of Notes (4 and 23 January 2002; TS 03 (2002); Cm 5473).

2 Headquarters Agreement between the Government of the United Kingdom and the International Wheat Council (London, 28 November 1968; TS 14 (1969); Cmnd 3882); amended by Exchange of Notes (London, 13 February to 13 March 1974; TS 138 (1975); Cmnd 6281); and by Exchange of Notes (London, 22 October to 10 November 1997; TS 16 (2000); Cm 4633).

3 Headquarters Agreement between the Government of the United Kingdom and the International Sugar Organisation (London, 29 May 1969; TS 88 (1969); Cmnd 4127); amended by Exchange of Notes (London, 18 to 30 January 1974; TS 141 (1975); Cmnd 6287); and by Exchange of Notes (London, 10 July to 15 August 1997; TS 19 (2000); Cm 4636).

4 Headquarters Agreement between the Government of the United Kingdom and the International Coffee Organisation (London, 28 May 1969; TS 86 (1969); Cmnd 4120); amended by Exchange of Notes (London, 2 to 15 May 1974; TS 147 (1975); Cmnd 6294); and by Exchange of Notes (London, 10 to 28 July 1997; TS 14 (2000); Cm 4628).

5 Headquarters Agreement between the Government of the United Kingdom and the International Cocoa Organisation (London, 26 March 1975; TS 94 (1975); Cmnd 6095); amended by Exchange of Notes (London, 10 to 21 July 1997; Cm 4628).

6 Headquarters Agreement between the Government of the United Kingdom and the International Whaling Commission (London, 21 August 1975; TS 108 (1975); Cmnd 6278); amended by Exchange of Notes (London/Cambridge, August 1981; TS 75 (1981); Cmnd 8387); and by Exchange of Notes (London, 10 July to 19 August 1997; TS 20 (2000); Cm 4637).

7 Headquarters Agreement between the government of the United Kingdom and the European Centre for Medium-Range Weather Forecasts (London, 1 March 1977; TS 49 (1977); Cmnd 6842); amended by Exchange of Notes (London, 11 to 28 July 1997; TS 33 (2000); Cm 4654).

8 Headquarters agreement between the government of the United Kingdom and the International Lead and Zinc Study Group (London, 21 December 1978; TS 42 (1979); Cmnd 7538); amended by Exchange of Notes (London, 10 to 28 July 1997; TS 36 (2000); Cm 4659).

9 Headquarters Agreement between the Government of the United Kingdom and the Commonwealth Agricultural Bureau (London, August 1982; TS 49 (1982); Cmnd 8715) amended by Exchange of Notes (London, 11 to 18 July 1997; TS 35 (2000); Cm 4650).

10 Headquarters Agreement between the Government of the United Kingdom and the North-East Atlantic Fisheries Commission (London, February 1999; TS 9 (1999); Cm 4265).

11 Headquarters Agreement between the Government of the United Kingdom and the International Rubber Study Group (London, 14 February 1978; TS 51 (1978); Cmnd 7211); amended by Exchange of Notes (London, 24 July to 13 August 1997; TS 18 (2000); Cm 4635).

12 Headquarters Agreement between the Government of the United Kingdom and the International Oil Pollution Compensation Fund (London, 27 July 1979; TS 80 (1979); Cmnd 7692); amended by Exchange of Notes (London, 1 to 8 December 1997; TS 22 (2000); Cm 4639).

13 Headquarters Agreement between the Government of the United Kingdom and the International Maritime Satellite Organisation (London, 25 February 1980; TS 44 (1980); Cmnd 7917).

14 Headquarters Agreement between the Government of the United Kingdom and the Commonwealth Foundation (London, 14 February 1983; TS 22 (1983); Cmnd 8862); amended by Exchange of Notes (London, 10 July to 5 August 1997; Cm 4223).

15 Headquarters Agreement between the Government of the United Kingdom and the Commonwealth Telecommunication Organisation (London, 30 March 1983; TS 36 (1983); Cmnd 8956); amended by Exchange of Notes (London, 7 to 12 November 1997; TS 15 (2000); Cm 4632).

16 Headquarters Agreement between the Government of the United Kingdom and the North Atlantic Salmon Conservation Organisation (London, 26 April 1985; TS 18 (1986); Cmnd 9752); amended by Exchange of Notes (London, 20 December 2000 and 4 January 2001; TS 5 (2001); Cm 5093).

17 Headquarters Agreement between the Government of the United Kingdom and the European Bank for Reconstruction and Development (London, 15 April 1991; TS 45 (1991); Cm 1615).

18 Headquarters Agreement between the Government of the United Kingdom and the International Oil Pollution Compensation Fund 1992 (London, 30 May 1996; TS 78 (1996); Cm 3354); amended by Exchange of Notes (London, 1 to 8 December 1997; TS 22 (2000); Cm 4223).

19 Headquarters Agreement between the Government of the United Kingdom and the International Mobile Satellite Organisation (London, 15 April 1999; TS 73 (1999); Cm 4511).

20 See the Exchange of Notes amending the Headquarters Agreement between the Government of the United Kingdom and INTELSAT (Washington, 18 September and 7 October 1997; TS 34 (2000); Cm 4655).

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### **309. General privileges and immunities of international organisations.**

Where an organisation is declared by Order in Council to be one of which the United Kingdom or its government and one or more foreign sovereign powers<sup>1</sup>, are members, then, to the extent specified by Order in Council, the legal capacities of a body corporate and certain immunities and privileges may be conferred on such an organisation<sup>2</sup>. The immunities and privileges which may be conferred are:

- 56 (1) immunity from suit and legal process<sup>3</sup>;
- 57 (2) the like inviolability of official archives and premises of the organisation as are accorded under the Vienna Convention on Diplomatic Relations to a diplomatic mission<sup>4</sup>;
- 58 (3) exemption or relief from taxes, other than duties (whether customs or excise) and taxes on the importation of goods<sup>5</sup>, and the same relief as in accordance with the Vienna Convention on Diplomatic Relations is accorded in respect of the premises of a diplomatic mission<sup>6</sup>;
- 59 (4) exemption from duties (whether customs or excise) and taxes on the importation of goods imported for the official use of the organisation in the United Kingdom, and on publications of the organisation imported by it or on its behalf, subject to compliance with such conditions as may be prescribed for the protection of the revenue by the Commissioners for Her Majesty's Revenue and Customs<sup>7</sup>;
- 60 (5) exemptions from prohibitions and restrictions on importation or exportation in the case of goods imported or exported by the organisation for its official use and on publications of the organisation<sup>8</sup>;
- 61 (6) relief under arrangements made with the Secretary of State or the Commissioners for Her Majesty's Revenue and Customs by way of refund of duty (whether customs or excise) or value added tax paid on hydrocarbon oil<sup>9</sup> imported and used for official purposes<sup>10</sup>; and
- 62 (7) relief under arrangements made by the Secretary of State by way of refund of car tax paid on any vehicles and value added tax paid on the supply of any goods or services which are used for the official purposes of the organisation<sup>11</sup>.

Limited exemptions from taxes are given in respect of securities issued by certain designated organisations of which the United Kingdom or any of the European Communities (including the European Investment Bank) is a member<sup>12</sup>.

An international organisation and its officers have no sovereign or diplomatic immunity unless these are conferred by a legislative instrument<sup>13</sup>. However, a United Kingdom court has no jurisdiction to make an order for the winding up of an international organisation<sup>14</sup>, and an application for the appointment of a receiver of an international organisation is not justiciable<sup>15</sup>.

Priority must be given to telecommunications to and from the Secretary-General of the United Nations, the heads of principal organs of the United Nations and the International Court of Justice<sup>16</sup>.

1 See the International Organisations Act 1968 s 1(1)(a), (b) (s 1(1)(b) substituted by the International Organisations Act 1981 s 1(1), so as to remove the previous exclusion of Commonwealth states). If at any time, the Organisation for Security and Co-operation in Europe (the 'OSCE') is not, for the purpose of the International

Organisations Act 1968 s 1, an organisation of which the United Kingdom, or Her Majesty's Government in the United Kingdom, and at least one other sovereign power, or the government of such a power are members, it is to be treated for those purposes as such an organisation: International Organisations Act 2005 s 4(1). Any agreement or formal understanding between the United Kingdom, or Her Majesty's Government in the United Kingdom and any other sovereign power or the government of such a power relating to the OSCE is to be treated for the purposes of the International Organisations Act 1968 s 1(5) and s 1(6)(a) (see PARAS 321-322) as an agreement between the United Kingdom and the OSCE: International Organisations Act 2005 s 4(1). The International Tribunal for the Law of the Sea (see PARAS 311, 497) is to be treated for the purposes of the International Organisations Act 1968 s 1 as an organisation of which the United Kingdom, or Her Majesty's government in the United Kingdom, and at least one other sovereign power, or the government of such a power, are members: International Organisations Act 2005 s 8. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

2 International Organisations Act 1968 s 1(1), (2)(a) (s 1(1) as amended: see note 1). Orders in Council must be laid in draft before Parliament and approved by a resolution of each House: see s 10(1), (2). They may be revoked or varied by other orders: s 10(3). Orders made under the International Organisations (Immunities and Privileges) Act 1950 (repealed) remain in force: International Organisations Act 1968 s 12(5); and see s 12(6).

3 International Organisations Act 1968 s 1(2)(b), Sch 1 para 1.

4 International Organisations Act 1968 s 11(1), Sch 1 para 2. See the articles of the Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmd 2565) (which are contained in the Diplomatic Privileges Act 1964 Sch 1: see PARA 265 note 2). As to the extent of inviolability of official archives see *Shearson Lehman Bros v Maclaine Watson & Co Ltd (No 2)* [1988] 1 All ER 116, [1988] 1 WLR 16, HL.

5 International Organisations Act 1968 Sch 1 para 3(1) (amended by the Customs and Excise Management Act 1979 s 177(1), Sch 4 para 12 Table Pt I).

6 International Organisations Act 1968 Sch 1 para 3(2). See the Vienna Convention on Diplomatic Relations art 23; the Diplomatic Privileges Act 1964 Sch 1; and PARA 269.

7 International Organisations Act 1968 Sch 1 para 4 (amended by the Customs and Excise Management Act 1979 Sch 4 para 12 Table Pt I); Revenue and Customs Act 2005 s 50. See **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900.

8 See the International Organisations Act 1968 Sch 1 para 5.

9 The hydrocarbon oil within the meaning of the Hydrocarbon Oil Duties Act 1979: see **CUSTOMS AND EXCISE** vol 12(23) (2007 Reissue) PARA 509 et seq.

10 International Organisations Act 1968 Sch 1 para 6 (amended by the Customs and Excise Management Act 1979 Sch 4 para 12 Table Pt I). This is subject to compliance with such conditions as may be imposed: International Organisations Act 1968 Sch 1 para 6 (as so amended).

11 International Organisations Act 1968 Sch 1 para 7 (amended by the Finance Act 1972 s 55(5), (7)). Any amount refunded under any arrangements must, if the arrangements were made by the Secretary of State, be made out of money provided by Parliament; or, if they were made by the Commissioners for Her Majesty's Revenue and Customs, be made out of money standing to the credit of the general account of the Commissioners: International Organisations Act 1968 s 9 (amended by the Finance Act 1972 s 55(5)); Revenue and Customs Act 2005 s 50. As to the relief from customs and excise duties for persons enjoying privileges and immunities under the International Organisations Act 1968 see the Customs and Excise Duties (General Reliefs) Act 1979 ss 13A-13C; and **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARAS 887, 894. As to the Secretary of State see PARA 29.

12 See PARA 310.

13 *Standard Chartered Bank Ltd v International Tin Council* [1986] 3 All ER 257, [1987] 1 WLR 641.

14 *Re International Tin Council* [1987] Ch 419 (a petition for winding up would also have attracted immunity under the relevant Order in Council made under the International Organisations Act 1968).

15 *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, sub nom *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523, HL. As to an order for discovery of assets in aid of execution see *Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1989] Ch 286, sub nom *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1988] 3 All ER 257, CA.



16 International Organisations Act 1968 s 7. This is so far as necessary for giving effect to the International Telecommunication Convention (Montreux, 12 November 1965; TS 41 (1967); Cmd 3383); see the International Organisations Act 1968 s 7.

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### **310. Tax exemptions for certain international organisations.**

Where the United Kingdom or the European Union is a member of an international organisation, and the agreement under which it became a member provides for exemption from tax, in relation to the organisation, of the kind described below, the Treasury may, by order made by statutory instrument, designate that organisation for the purpose<sup>1</sup>. Where an organisation has been so designated, the provisions apply in relation to that organisation, with the exception of any which may be excluded by the designation order<sup>2</sup>.

Any security issued by the organisation must be taken, for the purposes of inheritance tax<sup>3</sup>, to be situated outside the United Kingdom<sup>4</sup>. No stamp duty is chargeable<sup>5</sup> on the issue of any instrument by the organisation or on the transfer of the stock constituted by, or transferable by means of, any instrument issued by the organisation<sup>6</sup>. No stamp duty reserve tax is chargeable<sup>7</sup> in respect of the issue of securities by the organisation<sup>8</sup>.

Similar provision is made in relation to exemption from income tax<sup>9</sup>, and tax on chargeable gains<sup>10</sup>.

Orders made or having effect under the provisions described above have been made designating the following bodies: (1) the Asian Development Bank<sup>11</sup>; (2) the African Development Bank<sup>12</sup>; (3) the European Economic Community, the European Coal and Steel Community, the European Atomic Energy Community and the European Investment Bank<sup>13</sup>; and (4) the European Bank for Reconstruction and Development<sup>14</sup>.

1 Finance Act 1984 s 126(1). The Treasury may designate any of the Communities or the European Investment Bank for these purposes: s 126(4) (added by the Finance Act 1985 s 96(1)). As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

2 Finance Act 1984 s 126(2).

3 As to inheritance tax generally see **INHERITANCE TAXATION**.

4 Finance Act 1984 s 126(3)(b) (amended by the Taxation of Chargeable Gains Act 1992 s 290, Sch 12).

5 Ie under the Finance Act 1999 Sch 15: see **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

6 Finance Act 1984 s 126(3)(c) (amended by the Finance Act 1999 s 113(3), Sch 16 para 4). In so far as it is applied by a designation under the Finance Act 1984 s 126(4) (see note 1), s 126(3)(c) is modified: see s 126(5) (added by the Finance Act 1985 s 96(1); and amended by the Finance Act 1999 Sch 16 para 4). The Finance Act 1984 s 126(3)(c), (5) are prospectively repealed by the Finance Act 1990 s 132, Sch 19 Pt VI as from the abolition day appointed under s 111.

7 Ie under the Finance Act 1986 s 93 (depository receipts) or s 96 (clearance services). See **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

8 Finance Act 1984 s 126(3)(d) (added by the Finance Act 1990 s 114).

9 See the Income Tax (Trading and Other Income) Act 2005 s 774; and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1233.

10 See the Taxation of Chargeable Gains Act 1992 s 265; and **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 286.

11 International Organisations (Tax Exempt Securities) Order 1984, SI 1984/1215.

- 12 International Organisations (Tax Exempt Securities) (No 2) Order 1984, SI 1984/1634.
- 13 European Communities (Tax Exempt Securities) Order 1985, SI 1985/1172.
- 14 International Organisations (Tax Exempt Securities) Order 1991, SI 1991/1202.

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### **311. Organisations with privileges and immunities, and status of body corporate.**

Certain privileges and immunities and the legal capacities of a body corporate<sup>1</sup> have been conferred upon the following organisations by Order in Council made or having effect under the International Organisations Act 1968<sup>2</sup>: the Advisory Centre on WTO Law<sup>3</sup>, the African Development Bank<sup>4</sup>, the African Development Fund<sup>5</sup>, the Asian Development Bank<sup>6</sup>, the Caribbean Development Bank<sup>7</sup>, the Central Treaty Organisation<sup>8</sup>, the Commission for Technical Co-operation in Africa South of the Sahara<sup>9</sup>, the Common Fund for Commodities<sup>10</sup>, the Commonwealth Agricultural Bureaux<sup>11</sup>, the Commonwealth Foundation<sup>12</sup>, the Commonwealth Telecommunications Organisation<sup>13</sup>, the Council of Europe<sup>14</sup>, the Customs Co-operation Council<sup>15</sup>, the European Centre for Medium-range Weather Forecasts<sup>16</sup>, the European Bank for Reconstruction and Development<sup>17</sup>, the European Molecular Biology Laboratory<sup>18</sup>, the European Organisation for Astronomical Research in the Southern Hemisphere<sup>19</sup>, the European Organisation for the Exploitation of Meteorological Satellites (EUMETSTAT)<sup>20</sup>, the European Organisation for Nuclear Research<sup>21</sup>, the European Organisation for the Safety of Air Navigation (Eurocontrol)<sup>22</sup>, the European Patent Organisation<sup>23</sup>, the European Police College<sup>24</sup>, the European Police Office (EUROPOL)<sup>25</sup>, the European Space Agency<sup>26</sup>, the European Telecommunications Satellite Organisation (EUTELSAT)<sup>27</sup>, the Inter-American Development Bank<sup>28</sup>, the International Atomic Energy Agency<sup>29</sup>, the International Cocoa Organisation<sup>30</sup>, the International Coffee Organisation<sup>31</sup>, the International Court of Justice<sup>32</sup>, the International Fund for Agricultural Development<sup>33</sup>, the International Fund for Ireland<sup>34</sup>, the International Grains Council and the Food Aid Committee<sup>35</sup>, the International Jute Organisation<sup>36</sup>, the International Lead and Zinc Study Group<sup>37</sup>, the International Maritime Organisation<sup>38</sup>, the International Mobile Satellite Organisation<sup>39</sup>, the International Monetary Fund<sup>40</sup>, the International Natural Rubber Organisation<sup>41</sup>, the International Oil Pollution Compensation Fund<sup>42</sup>, the International Oil Pollution Compensation Fund 1992<sup>43</sup>, the International Organisation for Migration<sup>44</sup>, the International Rubber Study Group<sup>45</sup>, the International Sea-Bed Authority<sup>46</sup>, the International Sugar Organisation<sup>47</sup>, the International Telecommunications Satellite Organisation (INTELSAT)<sup>48</sup>, the International Tin Council<sup>49</sup>, the International Trust Fund for Tuvalu<sup>50</sup>, the International Tribunal for the Law of the Sea<sup>51</sup>, the International Whaling Commission<sup>52</sup>, the North Atlantic Treaty Organisation<sup>53</sup>, the Organisation for Economic Co-operation and Development<sup>54</sup>, the OECD Financial Support Fund<sup>55</sup>, the Organisation for Joint Armament Co-operation<sup>56</sup>, the Organisation for the Prohibition of Chemical Weapons<sup>57</sup>, the Oslo Commission and the Paris Commission<sup>58</sup>, the OSPAR Commission<sup>59</sup>, the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organisation<sup>60</sup>, the South-East Asia Treaty Organisation<sup>61</sup>, the United Nations<sup>62</sup>, the Western European Union<sup>63</sup>, and the World Trade Organisation<sup>64</sup>.

Immunities, privileges and capacity have also been conferred on the following specialised agencies of the United Nations: the Food and Agriculture Organisation, the International Civil Aviation Organisation, the International Labour Organisation, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organisation, the Universal Postal Union, the World Health Organisation, the World Meteorological Organisation, and the World Intellectual Property Organisation<sup>65</sup>. Immunities and privileges have also been conferred on the Military Staff of the European Union (EUMS)<sup>66</sup>.

<sup>1</sup> See PARA 309.

- 2     le made or having effect under the International Organisations Act 1968 s 1: see PARA 309. For provisions conferring comparable immunities under other legislation see PARA 313.
- 3     Advisory Centre on WTO Law (Immunities and Privileges) Order 2001, SI 2001/1868.
- 4     African Development Bank (Immunities and Privileges) Order 1983, SI 1983/142 (amended by SI 1999/2034).
- 5     African Development Fund (Immunities and Privileges) Order 1973, SI 1973/958 (amended by SI 1975/1209; SI 1999/2034).
- 6     Asian Development Bank (Immunities and Privileges) Order 1974, SI 1974/1251 (amended by SI 1975/1209; SI 1999/2034).
- 7     Caribbean Development Bank (Immunities and Privileges) Order 1972, SI 1972/113 (amended by SI 1975/1209; SI 1999/2034).
- 8     Central Treaty Organisation (Immunities and Privileges) Order 1974, SI 1974/1252 (amended by SI 1975/1209).
- 9     International Organisations (Immunities and Privileges of the Commission for Technical Co-operation in Africa South of the Sahara) Order 1955, SI 1955/1208.
- 10    Common Fund for Commodities (Immunities and Privileges) Order 1981, SI 1981/1802.
- 11    Commonwealth Agricultural Bureaux (Immunities and Privileges) Order 1982, SI 1982/1071 (amended by SI 1999/2034).
- 12    Commonwealth Foundation (Immunities and Privileges) Order 1983, SI 1983/143 (amended by SI 1999/2034).
- 13    Commonwealth Telecommunications Organisation (Immunities and Privileges) Order 1983, SI 1983/144 (amended by SI 1999/2034).
- 14    Council of Europe (Immunities and Privileges) Order 1960, SI 1960/442.
- 15    Customs Co-operation Council (Immunities and Privileges) Order 1974, SI 1974/1253 (amended by SI 1975/1209; SI 2006/1075).
- 16    European Centre for Medium-range Weather Forecasts (Immunities and Privileges) Order 1975, SI 1975/158 (amended by SI 1975/1209; SI 1976/216; SI 1981/1109; SI 1999/2034).
- 17    European Bank for Reconstruction and Development (Immunities and Privileges) Order 1991, SI 1991/757 (amended by SI 1999/2034). See also the Bretton Woods Agreements Order in Council 1946, SR & O 1946/36 (amended by SI 1974/1261; SI 1976/221; SI 1977/825), conferring immunities and privileges on the International Bank for Reconstruction and Development and the International Monetary Fund: see PARA 313.
- 18    European Molecular Biology Laboratory (Immunities and Privileges) Order 1994, SI 1994/1890 (amended by SI 1999/2034).
- 19    European Organization for Astronomical Research in the Southern Hemisphere (Immunities and Privileges) Order 2009, SI 2009/1748.
- 20    EUMETSAT (Immunities and Privileges) Order 1988, SI 1988/1298 (amended by SI 1999/2034).
- 21    European Organisation for Nuclear Research (Privileges and Immunities) Order 2006, SI 2006/1922.
- 22    Eurocontrol (Immunities and Privileges) Order 1970, SI 1970/1940 (amended by SI 1975/1209; SI 1980/1076; SI 1984/127; SI 1999/2034). See also PARA 313.
- 23    European Patent Organisation (Immunities and Privileges) Order 1978, SI 1978/179 (amended by SI 1980/1096; SI 1999/2034).
- 24    European Police College (Immunities and Privileges) Order 2004, SI 2004/3334.
- 25    European Communities (Immunities and Privileges of the European Police Office) Order 1997, SI 1997/2973 (amended by SI 2004/3330); and prospectively replacing the European Police Office (Legal Capacities) Order 1996, SI 1996/3157 (see PARA 312 note 10).

- 26 European Space Agency (Immunities and Privileges) Order 1978, SI 1978/1105 (amended by SI 1980/1096; SI 1999/2034).
- 27 EUTELSAT (Immunities and Privileges) Order 1988, SI 1988/1299 (amended by SI 1999/2034; SI 2001/963).
- 28 Inter-American Development Bank (Immunities and Privileges) Order 1976, SI 1976/222 (amended by SI 1980/1096; SI 1984/1981; SI 1999/2034).
- 29 International Atomic Energy Agency (Immunities and Privileges) Order 1974, SI 1974/1256 (amended by SI 1975/1209; SI 2006/1075).
- 30 International Cocoa Organisation (Immunities and Privileges) Order 1975, SI 1975/411 (amended by SI 1975/1209; SI 1999/2034).
- 31 International Coffee Organisation (Immunities and Privileges) Order 1969, SI 1969/733 (amended by SI 1975/1209; SI 1999/2034).
- 32 United Nations and International Court of Justice (Immunities and Privileges) Order 1974, SI 1974/1261 (amended SI 1975/1209; SI 2002/1828; SI 2006/1075).
- 33 International Fund for Agricultural Development (Immunities and Privileges) Order 1977, SI 1977/824 (amended by SI 1980/1096).
- 34 International Fund for Ireland (Immunities and Privileges) Order 1986, SI 1986/2017.
- 35 International Wheat Council (Immunities and Privileges) Order 1968, SI 1968/1863 (amended by SI 1975/1209; SI 1999/2034).
- 36 International Jute Organisation (Immunities and Privileges) Order 1983, SI 1983/1111.
- 37 International Lead and Zinc Study Group (Immunities and Privileges) Order 1978, SI 1978/1893 (amended by SI 1984/1982; SI 1999/2034).
- 38 International Maritime Organisation (Immunities and Privileges) Order 2002, SI 2002/1826.
- 39 International Mobile Satellite Organisation (Immunities and Privileges) Order 1999, SI 1999/1125.
- 40 International Monetary Fund (Immunities and Privileges) Order 1977, SI 1977/825. See also the Bretton Woods Agreements Order in Council 1946, SR & O 1946/36 (amended by SI 1974/1261; SI 1976/221; SI 1977/825), conferring immunities and privileges on the International Bank for Reconstruction and Development and the International Monetary Fund.
- 41 International Natural Rubber Organisation (Immunities and Privileges) Order 1981, SI 1981/1804.
- 42 International Oil Pollution Compensation Fund (Immunities and Privileges) Order 1979, SI 1979/912 (amended by SI 1999/2034).
- 43 International Oil Pollution Compensation Fund 1992 (Immunities and Privileges) Order 1996, SI 1996/1295 (amended by SI 1999/2034).
- 44 International Organisation for Migration (Immunities and Privileges) Order 2008, SI 2008/3124
- 45 International Rubber Study Group (Immunities and Privileges) Order 1978, SI 1978/181 (amended by SI 1980/1096; SI 1999/2034).
- 46 International Sea-Bed Authority (Immunities and Privileges) Order 2000, SI 2000/1815 (amended by SI 2006/1075).
- 47 International Sugar Organisation (Immunities and Privileges) Order 1969, SI 1969/734 (amended by SI 1975/1209; SI 1999/2034). The International Organisations Act 1968 continues to apply to the International Sugar Organisation even if Her Majesty should cease to be a member of it: International Sugar Organisation Act 1973 s 1. The International Sugar Organisation (Immunities and Privileges) Order 1969, SI 1969/734, thus continues in force.
- 48 INTELSAT (Immunities and Privileges) Order 1979, SI 1979/911 (amended by SI 1999/2032).

- 49 International Tin Council (Immunities and Privileges) Order 1972, SI 1972/120 (amended by SI 1975/1209).
- 50 International Trust Fund for Tuvalu (Immunities and Privileges) Order 1988, SI 1988/245.
- 51 International Tribunal for the Law of the Sea (Immunities and Privileges) Order 2005, SI 2005/2047. The International Tribunal for the Law of the Sea (see PARA 497) is to be treated for the purposes of the International Organisations Act 1968 s 1 as an organisation of which the United Kingdom, or Her Majesty's Government in the United Kingdom, and at least one other sovereign power, or the government of such a power, are members: see the International Organisations Act 2005 s 8; and PARA 309.
- 52 International Whaling Commission (Immunities and Privileges) Order 1975, SI 1975/1210 (amended by SI 1999/2034).
- 53 North Atlantic Treaty Organisation (Immunities and Privileges) Order 1974, SI 1974/1257 (amended by SI 1975/1209).
- 54 Organisation for Economic Co-operation and Development (Immunities and Privileges) Order 1974, SI 1974/1258 (amended by SI 1975/1209; SI 2006/1075).
- 55 OECD Financial Support Fund (Immunities and Privileges) Order 1976, SI 1976/224 (amended by SI 1980/1096).
- 56 Organisation for Joint Armament Co-operation (Immunities and Privileges) Order 2000, SI 2000/1105.
- 57 Organisation for the Prohibition of Chemical Weapons (Immunities and Privileges) Order 2001, SI 2001/3921 (amended by SI 2006/1075).
- 58 Oslo and Paris Commissions (Immunities and Privileges) Order 1979, SI 1979/914 (amended by SI 1999/2034).
- 59 OSPAR Commission (Immunities and Privileges) Order 1997, SI 1997/2975.
- 60 Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organisation (Immunities and Privileges) Order 2004, SI 2004/1282 (amended by SI 2006/1075).
- 61 South-East Asia Treaty Organisation (Immunities and Privileges) Order 1974, SI 1974/1259 (amended by SI 1975/1209).
- 62 United Nations and International Court of Justice (Immunities and Privileges) Order 1974, SI 1974/1261 (amended by SI 1975/1209; SI 2002/1828; SI 2006/1075). Notwithstanding the entry into force for the United Kingdom of the constitution of the United Nations Industrial Development Organisation (UNIDO), the provisions of the United Nations and International Court of Justice (Immunities and Privileges) Order 1974, SI 1974/1261, continue to apply to UNIDO, its officers and representatives of members: United Nations Industrial Development Organisation (Immunities and Privileges) Order 1982, SI 1982/1074.
- 63 Western European Union (Immunities and Privileges) Order 1960, SI 1960/444.
- 64 World Trade Organisation (Immunities and Privileges) Order 1995, SI 1995/266 (amended by SI 2006/1075).
- 65 Specialised Agencies of the United Nations (Immunities and Privileges) Order 1974, SI 1974/1260 (amended by SI 1975/1209; SI 1985/451; SI 1985/753; SI 2002/1827; SI 2006/1075); Specialised Agencies of the United Nations (Immunities and Privileges of UNESCO) Order 2001, SI 2001/2650. See also *Entico Corp v UNESCO* [2008] EWHC 532 (Comm), [2008] 2 All ER (Comm) 97, [2008] All ER (D) 255 (Mar) (no contravention of Art 6(1) European Convention on Human Rights where specialised agency enjoys immunity from suit).
- 66 European Union Military Staff (Immunities and Privileges) Order 2009, SI 2009/887.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(9) INTERNATIONAL ORGANISATIONS/312. Legal capacities of bodies corporate.

### **312. Legal capacities of bodies corporate.**

The legal capacities of a body corporate (but no privileges or immunities)<sup>1</sup> have been conferred<sup>2</sup> upon the Agency for International Trade Information and Co-operation<sup>3</sup>, the Commission for the Conservation of Antarctic Marine Living Resources<sup>4</sup>, the European Organisation for Nuclear Research<sup>5</sup>, the International Copper Study Group<sup>6</sup>, the International Hydrographic Organisation<sup>7</sup>, the International Tropical Timber Organisation<sup>8</sup>, the International Union for the Protection of New Varieties of Plants<sup>9</sup>, and the European Police Office (EUROPOL)<sup>10</sup>.

1 For the organisations on which both legal capacity and privileges and immunities have been conferred see PARA 311.

2 Ie under the International Organisations Act 1968 s 1: see PARA 309.

3 Agency for International Trade Information and Co-operation (Legal Capacities) Order 2004, SI 2004/3332.

4 Commission for the Conservation of Antarctic Marine Living Resources (Immunities and Privileges) Order 1981, SI 1981/1108.

5 European Organisation for Nuclear Research (Immunities and Privileges) Order 1972, SI 1972/115; European Organisation for Nuclear Research (Immunities and Privileges) Order 2006, SI 2006/1922. See PARA 311 note 21.

6 International Copper Study Group (Legal Capacities) Order 1999, SI 1999/2033.

7 International Hydrographic Organisation (Immunities and Privileges) Order 1972, SI 1972/119.

8 International Tropical Timber Organisation (Legal Capacities) Order 1984, SI 1984/1152.

9 International Union for the Protection of New Varieties of Plants (Legal Capacities) Order 1985, SI 1985/446.

10 European Police Office (Legal Capacities) Order 1996, SI 1996/3157 (revoked and replaced, as from a day to be appointed, by the European Communities (Immunities and Privileges of the European Police Office) Order 1997, SI 1997/2973 (amended by SI 2004/3330) (see PARA 311 note 25)). At the date at which this volume states the law no such day had been appointed.



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### **313. Further provisions for immunities and privileges.**

The European Organisation for the Safety of Air Navigation (Eurocontrol)<sup>1</sup> has the legal capacity of a body corporate and is entitled to inviolability of official archives and premises and to relief from rates and taxes<sup>2</sup>.

The Commonwealth Telecommunications Bureau has the legal capacity of a body corporate<sup>3</sup>.

Provision may be made by Order in Council with regard to the status of the International Bank for Reconstruction and Development, the International Finance Corporation and the International Development Association, and their governors, directors, alternates, officers and employees<sup>4</sup>.

Provision may be made by Order in Council with regard to the status of the International Monetary Fund and its governors, directors, alternates, officers and employees<sup>5</sup>.

Legal status, privileges and immunities are also conferred on: the Multilateral Investment Guarantee Agency (and its governors, directors, alternates, president and staff)<sup>6</sup>; the Independent Commission for the Location of Victims' Remains<sup>7</sup> (and its members)<sup>8</sup>; the Independent International Commission on Decommissioning<sup>9</sup> (and its members)<sup>10</sup>; the Commonwealth Secretariat (and its officers and servants and their families)<sup>11</sup>; the North-East Atlantic Fisheries Commission<sup>12</sup>; the European School<sup>13</sup>; the North Atlantic Salmon Conservation Organisation<sup>14</sup>; the Joint European Torus<sup>15</sup>; and the International Criminal Court (and certain specified categories of individuals connected with it)<sup>16</sup>.

1 The organisation was established under the Convention relating to Co-operation for the Safety of Air Navigation (Eurocontrol) (Brussels, 13 December 1960; TS 39 (1963); Cmnd 2114); and see the Additional Protocol of 6 July 1970 (Cmnd 4499). See also **AIR LAW** vol 2 (2008) PARA 23.

2 See the Civil Aviation Act 1982 s 24, Sch 4 para 1 (amended by the Civil Aviation (Eurocontrol) Act 1983 s 2). See also the Eurocontrol (Immunities and Privileges) Order 1970, SI 1970/1940 (amended by SI 1975/1209; SI 1980/1076; SI 1984/127; SI 1999/2034); and PARA 311 note 22.

3 Commonwealth Telecommunications Act 1968 s 1.

4 See the International Development Act 2002 s 12.

5 See the International Monetary Fund Act 1979 s 5(1), (3). The Bretton Woods Agreements Order in Council 1946, SR & O 1946/36 (amended by SI 1974/1261; SI 1976/221; SI 1977/825) has effect partly under these provisions: International Monetary Fund Act 1979 s 6(2). As to the power to extend the provisions by Order in Council beyond the United Kingdom see s 5(2). See also PARA 311 note 40.

6 See the Multilateral Investment Guarantee Agency Act 1988 ss 1(2), 3, Schedule arts 1, 44, 45, 46(a), 47, 48(i), 50. These provisions are extended to Anguilla, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St Helena, Turks and Caicos Islands: Multilateral Investment Guarantee Agency (Overseas Territories) Order 1988, SI 1988/791 (amended by SI 1988/1300).

7 See generally the Northern Ireland (Location of Victims' Remains) Act 1999 s 2.

8 See the Northern Ireland (Location of Victims' Remains) Act 1999 (Immunities and Privileges) Order 1999, SI 1999/1437, made under the Northern Ireland (Location of Victims' Remains) Act 1999 s 2(1).

9 See generally the Northern Ireland Arms Decommissioning Act 1997; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

10 See the Northern Ireland Arms Decommissioning Act 1997 (Immunities and Privileges) Order 1997, SI 1997/2231, made under the Northern Ireland Arms Decommissioning Act 1997 s 7(2).

11 See the Commonwealth Secretariat Act 1966 s 1, Schedule; and **COMMONWEALTH** vol 13 (2009) PARA 723. There is no contravention of the European Convention on Human Rights art 6(1) where the Commonwealth Secretariat enjoys immunity from suit: *Jananygam v Commonwealth Secretariat* [2007] All ER (D) 193 (Mar), EAT. The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (commonly referred to as the 'European Convention on Human Rights') is set out in the Human Rights Act 1998 Sch 1: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 122 et seq.

12 European Communities (Immunities and Privileges of the North-East Atlantic Fisheries Commission) Order 1999, SI 1999/278.

13 European Communities (Privileges of the European School) Order 1990, SI 1990/237 (amended by SI 2001/3674).

14 European Communities (Immunities and Privileges of the North Atlantic Salmon Conservation Organisation) Order 1985, SI 1985/1773 (amended by SI 2001/3673).

15 European Communities (Privileges of the Joint European Torus) Order 1978, SI 1978/1033 (amended by SI 1980/1096).

16 See the International Criminal Court Act 2001 Sch 1 para 1 (amended by the International Organisations Act 2005 ss 6, 11); the International Criminal Court (Immunities and Privileges) (No 1) Order 2006, SI 2006/1907; and the International Criminal Court (Immunities and Privileges) (No 2) Order 2006, SI 2006/1908.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(9) INTERNATIONAL ORGANISATIONS/314. International judicial proceedings.

### **314. International judicial proceedings.**

An Order in Council may confer such privileges, immunities and facilities as may be required to give effect to any agreement to which the United Kingdom<sup>1</sup> or its government is or will be party, or to any resolution of the General Assembly of the United Nations<sup>2</sup>, upon:

- 63 (1) judges or members of any international tribunal<sup>3</sup> or persons exercising or performing or appointed to exercise or perform any jurisdiction or functions of such a tribunal<sup>4</sup>;
- 64 (2) registrars or other officers of any such tribunal<sup>5</sup>;
- 65 (3) parties to proceedings before such a tribunal<sup>6</sup>;
- 66 (4) the agents, advisers and advocates of parties<sup>7</sup>; and
- 67 (5) witnesses and assessors<sup>8</sup>.

Orders have been made in respect of the European Court of Human Rights<sup>9</sup>, the International Court of Justice<sup>10</sup>, the tribunal established by the Convention on the Establishment of a Security Control in the Field of Nuclear Energy<sup>11</sup>, arbitration proceedings relating to INTELSTAT<sup>12</sup>, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>13</sup>, and the International Tribunal for the Law of the Sea<sup>14</sup>.

1 As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

2 International Organisations Act 1968 s 5(1). Section 5 applies to members of the family of a judge of the European Court of Human Rights as it applies to a judge of that court: s 7.

3 'International tribunal' means any court (including the International Court of Justice), tribunal, commission or body which in pursuance of any such agreement or resolution exercises jurisdiction or performs judicial functions or is appointed to do so: International Organisations Act 1968 s 5(5).

4 International Organisations Act 1968 s 5(2)(a).

5 International Organisations Act 1968 s 5(2)(b).

6 International Organisations Act 1968 s 5(2)(c). 'Proceedings' means any communication made to the tribunal, with a view to its being acted upon by the tribunal, and whether or not it is made through a person who may receive it in accordance with the practice of the tribunal: s 5(3).

7 International Organisations Act 1968 s 5(2)(d). 'Parties' includes persons acting in the proceedings as next friend, guardian or other representative of a party and any other person allowed by the practice of the tribunal to participate by way of advising or assisting: s 5(4). Any person making a communication to the tribunal within s 5(3) is deemed to be a party to the proceedings: s 5(3).

8 International Organisations Act 1968 s 5(2)(e).

9 See the European Commission and Court of Human Rights (Immunities and Privileges) Order 1970, SI 1970/1941 (amended by SI 1990/2290); European Court of Human Rights (Immunities and Privileges) Order 2000, SI 2000/1817 (amended by SI 2005/3425; SI 2006/1075). See **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

10 See the United Nations and International Court of Justice (Immunities and Privileges) Order 1974, SI 1974/1261 (amended by SI 1975/1209; SI 2002/1828; SI 2006/1075). As to the International Court of Justice see PARA 499 et seq.

11 See the Organisation for Economic Co-operation and Development (Immunities and Privileges) Order 1974, SI 1974/1258 (amended by SI 1975/1209; SI 2006/1075).

12 See the INTELSAT (Immunities and Privileges) Order 1979, SI 1979/911 (amended by SI 1999/2032).

13 See the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Immunities and Privileges) Order 1988, SI 1988/926.

14 International Tribunal for the Law of the Sea (Immunities and Privileges) Order 1996, SI 1996/272 (revoked and replaced, as from a day to be appointed, by the International Tribunal for the Law of the Sea (Immunities and Privileges) Order 2005, SI 2005/2047): see PARA 311. At the date at which this volume states the law no such day had been appointed.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(9) INTERNATIONAL ORGANISATIONS/315. Organisations of which the United Kingdom is not a member.

### **315. Organisations of which the United Kingdom is not a member.**

Where an organisation of which two or more sovereign powers<sup>1</sup> or governments are members, but of which the United Kingdom<sup>2</sup> is not a member, maintains or proposes to maintain an establishment in the United Kingdom, then, for the purpose of giving effect to any agreement between the United Kingdom or its government and such organisation, the legal capacities of a body corporate may be conferred by Order in Council<sup>3</sup> and the organisation may be entitled, to the extent specified in the order, to such exemptions or relief from taxes on income and capital gains as is accorded to a foreign sovereign power<sup>4</sup>.

Such an order made with respect to an international commodity organisation<sup>5</sup> may: (1) confer certain privileges and immunities<sup>6</sup> in respect of the organisation<sup>7</sup>; (2) confer certain other privileges and immunities<sup>8</sup> on persons of any specified class<sup>9</sup>; (3) provide that the official papers of such persons are inviolable<sup>10</sup>; and (4) confer certain privileges and immunities<sup>11</sup> on officers and servants of the organisation<sup>12</sup>.

Further, an Order in Council made under the provisions described above may confer certain privileges and immunities on representatives to conferences in the United Kingdom convened by an international organisation<sup>13</sup>.

An international organisation created by a treaty to which the United Kingdom is not a party cannot be recognised by the courts without the intervention of Parliament, but it will be recognised by the courts if it is created also as a corporate body under the law of a foreign state<sup>14</sup>. However, any questions as to the meaning, effect and operation of the constitution of the organisation must be determined by the treaty and international law, not by the domestic law of the state<sup>15</sup>.

1 'Sovereign powers' here includes Commonwealth states: see PARA 309 note 1.

2 As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 At the date at which this volume states the law no such order had been made.

4 International Organisations Act 1968 s 4 (amended by the European Communities Act 1972 s 4, Sch 3; and the International Organisations Act 1981 ss 1(2), 6(4), Schedule).

5 'International commodity organisation' means any such organisation as is mentioned in the International Organisations Act 1968 s 4 which appears to Her Majesty to satisfy each of the following conditions: (1) that the members of the organisation are states or the governments of states in which a particular commodity is produced or consumed; (2) that the exports or imports of that commodity from or to those states account (when taken together) for a significant volume of the total exports or imports of that commodity throughout the world; and (3) that the purpose or principal purpose of the organisation is to regulate trade in that commodity (whether as an import or an export or both) or to promote or study that trade, or to promote research into that commodity or its uses or further development: s 4A(1) (s 4A added by the International Organisations Act 1981 s 2). 'Commodity' means any produce of agriculture, forestry or fisheries or any mineral, either in its natural state or having undergone only such processes as are necessary or customary to prepare the produce or mineral for the international market: International Organisations Act 1968 s 4A(5) (as so added).

6 ie those set out in the International Organisations Act 1968 Sch 1 paras 2, 3, 4, 6, 7 (see PARA 309).

7 International Organisations Act 1968 s 4A(2)(a) (as added: see note 5).

8 ie those set out in the International Organisations Act 1968 Sch 1 paras 11, 14 (see PARAS 317, 319). An Order in Council under s 4 in respect of an international commodity organisation may to such extent as may be

specified in the order confer on persons of any such class as may be specified in the order, being persons who are or are to be representatives (whether of governments or not) at any conference which the organisation may convene in the United Kingdom, the privileges and immunities set out in Sch 1 paras 11, 14, and provide that the official papers of such persons are inviolable: s 5A(1)(a), (b) (s 5A added by the International Organisations Act 1981 s 3). See further the International Organisations Act 1968 s 5A(2), (3) (as so added).

9 International Organisations Act 1968 s 4A(2)(b) (as added: see note 5). The classes of persons referred to are: (1) persons who (whether they represent governments or not) are representatives to the organisation or representatives on, or members of, any organ, committee or other subordinate body of the organisation (including any sub-committee or other subordinate body of a subordinate body of the organisation); or (2) persons who are members of the staff of any such representative and who are recognised by the United Kingdom government as holding a rank equivalent to that of a diplomatic agent: s 4A(3) (as so added). An Order in Council may not confer on any person of such class as is mentioned in head (1) or head (2) of this note any immunity in respect of a civil action arising out of an accident caused by a motor vehicle or other means of transport belonging to or driven by such a person, or in respect of a traffic offence involving such a vehicle and committed by such a person: s 4A(4) (as so added).

10 International Organisations Act 1968 s 4A(2)(c) (as added: see note 5).

11 Ie those set out in the International Organisations Act 1968 Sch 1 paras 13, 15, 16 (see PARAS 317, 319).

12 International Organisations Act 1968 s 4A(2)(d) (as added: see note 5).

13 See the International Organisations Act 1968 s 5A; and PARA 317.

14 *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114, [1991] 1 All ER 871, HL.

15 *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] QB 282, [1995] 2 All ER 387.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(9) INTERNATIONAL ORGANISATIONS/316. Bodies established under Treaty on European Union.

### **316. Bodies established under Treaty on European Union.**

Her Majesty may by Order in Council make any one or more of the following provisions in respect of a specified<sup>1</sup> body<sup>2</sup>:

- 68 (1) confer on the body the legal capacities of a body corporate<sup>3</sup>;
- 69 (2) provide that the body must, to such extent as is specified, have such specified privileges and immunities as, having regard to the obligations referred to<sup>4</sup>, it is in the opinion of Her Majesty in Council appropriate for the body to have<sup>5</sup>;
- 70 (3) confer on specified classes of persons<sup>6</sup>, to such extent as is specified, such specified privileges and immunities as, having regard to those obligations, it is in the opinion of her Majesty in Council appropriate to confer on them<sup>7</sup>.

1 'Specified' means specified in the Order in Council: International Organisations Act 1968 s 4B(4) (s 4B added by the International Organisations Act 2005 s 5).

2 Ie any body established under the Treaty on European Union (Maastricht, 7 February 1992; Cmnd 1934) Title V or Title VI as amended from time to time (International Organisations Act 1968 s 4B(1)(a) (as added: see note 1)) and in relation to which the United Kingdom, or Her Majesty's government in the United Kingdom, has obligations by virtue of any agreement to which the United Kingdom, or her Majesty's government in the United Kingdom, is a party, whether made with another sovereign power or the government of such a power or not (s 4B(1)(b) (as so added)).

3 International Organisations Act 1968 s 4B(2)(a) (as added: see note 1).

4 Ie referred to in the International Organisations Act 1968 s 4B(1)(b): see note 2.

5 International Organisations Act 1968 s 4B(2)(b) (as added: see note 1).

6 Ie the body's officers or staff, other persons connected with the body, and members of their families who form part of their households: International Organisations Act 1968 s 4B(3) (as added: see note 1).

7 International Organisations Act 1968 s 4B(2)(c) (as added: see note 1).

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### **317. Representatives, members of subordinate bodies, high officers, experts and persons on missions.**

Representatives of international organisations and other persons may have conferred on them by Order in Council to the extent specified by the order certain privileges and immunities<sup>1</sup>.

The classes of persons on whom these privileges and immunities may be conferred are: (1) persons who (whether they represent governments or not) are representatives to an organisation specified by Order in Council to be one of which the United Kingdom<sup>2</sup> or its government and one or more foreign powers<sup>3</sup> or governments are members, or representatives on, or members of, any organ, committee or other subordinate body of the organisation, including any sub-committee or other subordinate body of a subordinate body of the organisation<sup>4</sup>; (2) holders of high offices, specified by Order in Council, in the organisation<sup>5</sup>; (3) persons employed by or serving under the organisation as experts or as persons engaged on missions for the organisation<sup>6</sup>; (4) representatives, specified by Order in Council, of a foreign sovereign power or government at a conference held in the United Kingdom attended by representatives of the United Kingdom or its government and one or more foreign sovereign powers or governments<sup>7</sup>; (5) persons of any such class as may be specified by Order in Council, being persons who are or are to be representatives (whether of governments or not) at any conference which a specified organisation may convene in the United Kingdom<sup>8</sup>.

The privileges and immunities are:

- 71 (a) the same immunity from suit and legal process, the same inviolability of residence, and the same exemption or relief from taxes and rates, other than duties (whether of customs or excise) and taxes on the importation of goods, as are accorded to the head of a diplomatic mission<sup>9</sup>;
- 72 (b) the same exemption or relief from being liable to pay anything in respect of council tax, as is accorded to the head of a diplomatic mission<sup>10</sup>;
- 73 (c) the same exemption from duties (whether of customs or excise) and taxes on the importation of certain articles for personal use as is accorded to a diplomatic agent<sup>11</sup>;
- 74 (d) the same exemption and privileges in respect of personal baggage as are accorded to a diplomatic agent<sup>12</sup>;
- 75 (e) relief under arrangements by way of refund of duty (whether of customs or excise) or value added tax paid on the importation of hydrocarbon oil<sup>13</sup> subject to compliance with conditions<sup>14</sup>;
- 76 (f) exemptions whereby services rendered are deemed to be excepted from any class of employment in respect of which contributions are payable under the social security legislation<sup>15</sup>;
- 77 (g) the same inviolability of official premises as is accorded in respect of the premises of a diplomatic mission<sup>16</sup>.

1 See the International Organisations Act 1968 s 1(2)(c), (3), Sch 1 Pt II. For Orders in Council made under s 1 see PARA 311.

2 As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.



- 3 'Foreign powers' here includes Commonwealth states: see PARA 309 note 1.
- 4 International Organisations Act 1968 s 1(1), (2)(c), (3)(a) (s 1(1) amended by the International Organisations Act 1981 s 1(1)).
- 5 See the International Organisations Act 1968 s 1(3)(b).
- 6 International Organisations Act 1968 s 1(3)(c).
- 7 See the International Organisations Act 1968 s 6(1)-(3) (s 6(1), (2) amended by the International Organisations Act 1981 s 1(3)). The CSCE Information Forum (Immunities and Privileges) Order 1989, SI 1989/480, the G8 Gleneagles (Immunities and Privileges) Order 2005, SI 2005/1456, and the London Summit (Immunities and Privileges) Order 2009, SI 2009/222, were made under this provision.
- 8 International Organisations Act 1968 s 5A(1)(a)(i) (s 5A added by the International Organisations Act 1981 s 3). See further the International Organisations Act 1968 s 5A(2), (3) (as so added).
- 9 International Organisations Act 1968 s 1(2)(c), Sch 1 paras 8, 9 (Sch 1 para 9 amended by the Customs and Excise Management Act 1979 s 177(1), Sch 4 para 12 Table Pt I). Customs duties include excise duties chargeable on goods imported into the United Kingdom: see PARA 278 note 1. See also PARA 267 et seq.
- 10 International Organisations Act 1968 Sch 1 para 9B (added by Local Government and Housing Act 1989 s 194(1), Sch 11 para 14; and amended by the Local Government Finance Act 1992 s 117(1), Sch 13 para 28).
- 11 International Organisations Act 1968 Sch 1 para 10 (amended by the Customs and Excise Management Act 1979 Sch 4 para 12 Table Pt I; and the International Organisations Act 1981 s 5(2)). This exemption is accorded under the Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) art 36 para 1 (see the Diplomatic Privileges Act 1964 Sch 1; and PARA 278).
- 12 International Organisations Act 1968 Sch 1 para 11. This exemption is accorded under the Vienna Convention on Diplomatic Relations art 36 para 2 (see the Diplomatic Privileges Act 1964 Sch 1; and PARA 278).
- 13 I.e hydrocarbon oil within the meaning of the Hydrocarbon Oil Duties Act 1979: see **CUSTOMS AND EXCISE** vol 12(2) (2007 Reissue) PARA 510.
- 14 International Organisations Act 1968 Sch 1 para 12 (amended by the Customs and Excise Management Act 1979 Sch 4 para 12 Table Pt I).
- 15 See the International Organisations Act 1968 Sch 1 para 13 (amended by the Social Security Act 1973 s 100, Sch 27 para 80; and the Social Security (Consequential Provisions) Act 1975 ss 1(2), 5, Sch 1).
- 16 International Organisations Act 1968 Sch 1 para 9A (added by the International Organisations Act 1981 s 5(1)).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(9) INTERNATIONAL ORGANISATIONS/318. Officers holding rank equivalent to that of diplomatic agent.

### **318. Officers holding rank equivalent to that of diplomatic agent.**

Where an Order in Council is made in respect of an organisation which is a specialised agency of the United Nations having its headquarters or principal office in the United Kingdom, then, for the purpose of giving effect to any agreement between the United Kingdom or its government and that organisation, the following exemptions, privileges and reliefs may be conferred to the extent specified in the order on officers of the organisation who are recognised as holding a rank equivalent to that of diplomatic agent<sup>1</sup>.

The exemptions, privileges and reliefs are the same as those accorded a diplomatic agent in respect of: (1) income tax, capital gains tax, rates and council tax; and (2) customs duties and taxes on the importation of certain articles for personal use, personal baggage, relief, under arrangements by way of refund of customs or excise duty paid on or value added tax paid on the importation of hydrocarbon oil, subject to compliance with conditions, and exemption from vehicle excise duty<sup>2</sup>.

Where an Order in Council is made specifying an organisation to be an organisation of which the United Kingdom or its government and one or more foreign powers or governments are members for the purpose of giving effect to an agreement between the United Kingdom or its government and the organisation, members of the staff of the organisation recognised as holding a rank equivalent to that of diplomatic agent may by order have conferred on them in the event of death exemptions from inheritance tax in respect of certain moveable property<sup>3</sup>.

A member of the official staff of a representative who is recognised as holding a rank equivalent to that of diplomatic agent may in certain circumstances be entitled to the same privileges and immunities as the representative<sup>4</sup>.

1 International Organisations Act 1968 s 2(1). As to the statutory meaning of 'United Kingdom' see PARA 30 note 2.

2 International Organisations Act 1968 s 2(2) (amended by the Diplomatic and other Privileges Act 1971 s 3; the Local Government Finance Act 1988 s 137, Sch 12 Pt III para 40; the Local Government Finance Act 1992 s 117(1), Sch 13 para 27; and the Vehicle Excise and Registration Act 1994 s 65, Sch 5 Pt I). The exemptions in head (1) in the text are those accorded by the Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) arts 34, 36: see PARAS 275, 278. As to the exemptions mentioned in head (2) in the text see the International Organisations Act 1968 s 1(2), Sch 1 paras 10-12; and PARA 317.

3 International Organisations Act 1968 s 1(5)(b), Sch 1 para 24 (amended by the Taxation of Chargeable Gains Act 1992 s 290(3), Sch 12). For orders made under the International Organisations Act 1968 s 1 conferring immunities and privileges see PARA 311.

4 See the International Organisations Act 1968 Sch 1 para 20.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(9) INTERNATIONAL ORGANISATIONS/319. Officers and servants of classes specified by Order in Council.

### **319. Officers and servants of classes specified by Order in Council.**

Officers and servants belonging to a class specified by Order in Council of an organisation specified by Order in Council to be one of which the United Kingdom or its government and one or more foreign powers or governments are members may have conferred on them by Order in Council, to the extent specified by the order, the following privileges and immunities<sup>1</sup>:

- 78 (1) immunity from suit and legal process in respect of things done or omitted to be done in performance of official duties<sup>2</sup>;
- 79 (2) exemption from income tax in respect of emoluments received as an officer or servant<sup>3</sup>;
- 80 (3) the same exemption from duties (whether of customs or excise) and taxes on articles which were imported at or about the time when the officer or servant first entered the United Kingdom for his personal use or that of members of his family forming part of his household, including articles intended for his establishment, or which were in his ownership or possession or that of such a member of his family, or which he or such a member of his family was under contract to purchase, immediately before he entered, and the same privilege as to the importation of such articles, as is accorded to a diplomatic agent<sup>4</sup>;
- 81 (4) exemption from duties (whether of customs or excise) and taxes on the importation of a motor vehicle to replace one imported under the previous exemption<sup>5</sup>;
- 82 (5) the same exemption and privileges in respect of personal baggage as is accorded to a diplomatic agent<sup>6</sup>.

1 International Organisations Act 1968 s 1(2)(c), (d). The privileges and immunities referred to are those mentioned in Sch 1 Pt III. A European Union national working in another member state as employee of an international organisation and enjoying a right of entry, residence and work derived from the privileges and immunities of that organisation does not thereby lose his status as a Community worker: Cases 389-390/87 *Echternach v Minister van Onderwijs En Wetenschappen* [1989] ECR 723, [1990] 2 CMLR 305, ECJ. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

2 International Organisations Act 1968 Sch 1 para 14.

3 International Organisations Act 1968 Sch 1 para 15.

4 International Organisations Act 1968 Sch 1 para 16 (amended by the Customs and Excise Management Act 1979 s 177(1), Sch 4 para 12 Table Pt I; and the International Organisations Act 1981 s 5(3)). These exemptions are conferred on diplomatic agents by the Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) art 36 para 1: see the Diplomatic Privileges Act 1964 Sch 1; and PARA 278.

5 International Organisations Act 1968 Sch 1 para 17 (amended by the Customs and Excise Management Act 1979 Sch 4 para 12 Table Pt I).

6 International Organisations Act 1968 Sch 1 para 18. See the Vienna Convention on Diplomatic Relations art 36 para 2; the Diplomatic Privileges Act 1964 Sch 1; and PARA 278.

Where an order is made for the purpose of giving effect to an agreement additional exemptions relating to social security may be conferred on the officers and servants and members of their family forming part of their households: International Organisations Act 1968 s 1(5)(a). See Sch 1 para 13; and PARA 317. For Orders in Council made under s 1 and conferring privileges and immunities see PARA 311.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(9) INTERNATIONAL ORGANISATIONS/320. Official staffs of representatives.

### **320. Official staffs of representatives.**

Where an Order in Council has been made, except in so far as the order otherwise provides, official staffs of representatives<sup>1</sup> have the following privileges and immunities<sup>2</sup>.

A member of the official staff<sup>3</sup> who is recognised as holding a rank equivalent to that of a diplomatic agent is entitled to the same privileges and immunities as the representative he accompanies<sup>4</sup>.

A member of the official staff who is employed in the administrative or technical service is entitled to certain of the same privileges and immunities<sup>5</sup> as the representative he accompanies<sup>6</sup>, but is not entitled to immunity from any civil proceedings in respect of any cause of action arising otherwise than in the course of his official duties<sup>7</sup>. He is entitled to exemptions relating to customs and excise duties and taxes<sup>8</sup> as if he were the holder of a high office specified by order<sup>9</sup>.

A member of the official staff who is employed in the domestic service is entitled to immunity from suit and legal process in respect of things done or omitted to be done in the course of the performance of official duties, certain exemptions from social security contributions<sup>10</sup>, and, to the same extent as the representative he accompanies, exemption from taxes on his emoluments<sup>11</sup>.

1 'Representative' means a person who is such a representative to the organisation specified in the relevant order, or such a representative on, or member of, an organ, committee or other subordinate body of that organisation as is mentioned in the International Organisations Act 1968 s 1(3)(a): Sch 1 para 19(a). In relation to members of the official staffs of persons who are representatives at international conferences, 'representative' means a person of a class specified by order under s 6: see s 6(3).

2 International Organisations Act 1968 ss 1(4), 6(3).

3 'Member of the official staff' means a person who accompanies a representative as part of his official staff in his capacity as a representative: International Organisations Act 1968 Sch 1 para 19(b).

4 International Organisations Act 1968 Sch 1 para 20. The privileges and immunities referred to are those set out in Sch 1 Pt II (paras 8-13), to the extent specified by the relevant order: see PARA 317.

5 Ie those set out in the International Organisations Act 1968 Sch 1 paras 9, 13 to the extent specified by the relevant order: see PARA 317.

6 International Organisations Act 1968 Sch 1 para 21(1).

7 International Organisations Act 1968 Sch 1 para 21(2).

8 Ie the exemptions in the International Organisations Act 1968 Sch 1 para 16: see PARA 319.

9 International Organisations Act 1968 Sch 1 para 21(3).

10 Ie the exemptions in the International Organisations Act 1968 Sch 1 para 13: see PARA 317.

11 International Organisations Act 1968 Sch 1 para 22.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(9) INTERNATIONAL ORGANISATIONS/321. Representatives' families.

### **321. Representatives' families.**

Where an Order in Council has been made, then, except in so far as the order otherwise provides, members of the families of representatives<sup>1</sup> have the following privileges and immunities<sup>2</sup>. Persons who are members of the family of and form part of the household of a representative, a high officer specified by order and, with certain exceptions, members of the official staff employed in the administrative or technical service are entitled to the same privileges as the representative, high officer or member of the official staff<sup>3</sup>.

Certain exemptions and privileges which may be conferred on officers or members of staff holding a rank equivalent to that of diplomatic agent may also be conferred on members of their family who form part of their household<sup>4</sup>.

1 As to the meaning of 'representative' see PARA 320 note 1.

2 International Organisations Act 1968 s 1(4).

3 International Organisations Act 1968 s 1(4), Sch 1 para 23. As to the privileges and immunities see Sch 1 Pt I (paras 8-13); and PARA 317.

4 International Organisations Act 1968 ss 1(5)(b)(ii), 2(3). See also s 1(5)(a).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(9) INTERNATIONAL ORGANISATIONS/322. Conditions of grant of immunities.

### **322. Conditions of grant of immunities.**

An Order in Council must be so framed as to secure:

- 83 (1) that there are not conferred on any persons any immunities or privileges greater in extent than those which at the time of the making of the order are required to be conferred on that person in order to give effect to any agreement to which the United Kingdom or the United Kingdom government is then a party, whether made with any other sovereign power or government or with one or more organisations in that behalf<sup>1</sup>; and
- 84 (2) that no immunity or privilege is in general conferred on any person as the representative of the United Kingdom or of the United Kingdom government or as a member of the staff of such a representative<sup>2</sup>.

1 International Organisations Act 1968 s 1(6)(a) (amended by the International Organisations Act 1981 s 1(1)). Notwithstanding the International Organisations Act 1968 s 6(1)(a), where any agreement to which the United Kingdom or Her Majesty's government in the United Kingdom is a party requires the conferral of any privileges and immunities on the spouse of any individual, Her Majesty may, by Order in Council, confer the same privileges and immunities on the civil partner of that individual: s 1(7) (added by SI 2005/3542). As to the general power to make Orders in Council under the International Organisations Act 1968 s 1 see PARA 309. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

2 International Organisations Act 1968 s 1(6)(b). However, an Order in Council may confer immunities on representatives of the United Kingdom to the Assembly of the Western European Union or to the Consultative Assembly of the Council of Europe (see PARAS 518, 534): International Organisations Act 1981 s 4.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(9) INTERNATIONAL ORGANISATIONS/323. Official information as to status.

**323. Official information as to status.**

If in any proceedings a question arises whether a person is or is not entitled to any privilege or immunity, a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question is conclusive evidence of that fact<sup>1</sup>.

<sup>1</sup> International Organisations Act 1968 s 8; and see *Zoernsch v Waldock* [1964] 2 All ER 256, [1964] 1 WLR 675, 8 BILC 837, CA. As to the Secretary of State see PARA 29.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(10) ARMED FORCES/324. Foreign armed forces.

## (10) ARMED FORCES

### 324. Foreign armed forces.

Where a state grants a right of passage through its territory to a foreign armed force, it thereby waives its jurisdiction over the force and its members and permits their conduct to be regulated by the disciplinary bodies of the force<sup>1</sup>. It is not clear whether, at customary international law, a foreign armed force and its members who are stationed in, as opposed to passing through, the territory of a foreign state are entitled to immunity from the jurisdiction of the state in which they are stationed, and if so, to what extent<sup>2</sup>. The view of the United Kingdom government is that such a force is not immune from the local jurisdiction, even when the force is stationed in the United Kingdom during hostilities against a common enemy<sup>3</sup>. In relation to foreign armed forces stationed in the United Kingdom, the matter is regulated to a large extent by a NATO agreement<sup>4</sup>. The state to which the armed force belongs is entitled to such immunity as it enjoys at common law<sup>5</sup>.

1 *Schooner Exchange v McFaddon* 7 Cranch 116 at 140 (1812), US SC, obiter per Marshall CJ. It has been held that in such cases the state to which the force belongs is responsible for damage caused by and violations of the local law by members of the force: *Republic of Panama v Schwartzfiger* (1925) 4 Ann Dig Case no 114, Panama SC.

2 It has sometimes been supposed that the United States Supreme Court equated sojourn with passage in *Coleman v Tennessee* 97 US 509 (1878) and in *Dow v Johnson* 100 US 158 (1879). However, these cases concerned forces which were in effect forces in occupation of hostile territory. The supremacy of the law of the receiving state was affirmed by the same court in *Wilson v Girard* 354 US 524 (1957). The view that the foreign armed force enjoys absolute immunity from the local law was rejected in Canada: see *Reference Re Exemption of United States Forces from Canadian Criminal Law* [1943] 4 DLR 11. The courts of Australia have asserted that the law of the receiving state applies to visiting forces: *Wright v Cantrell* (1943) 44 SR (NSW) 45 (officer in charge of unit of United States army not entitled to immunity in respect of civil action); *Chow Hung Ching v R* (1949) 77 CLR 449, Aust HC (exclusive jurisdiction of the authorities of a visiting force limited to administrative control and discipline). Possibly all that international law requires is that internal disciplinary organisation should not be interfered with. See Barton 'Foreign Armed Forces: Immunity from Supervisory Jurisdiction' 26 BYIL 380; Barton 'Foreign Armed Forces: Immunity from Criminal Jurisdiction' 27 BYIL 186; Barton 'Foreign Armed Forces: Qualified Jurisdictional Immunity' 31 BYIL 341.

3 This was the view taken in 1942 with respect to the stationing of United States forces in the United Kingdom: see 8 Whiteman's Digest 386, 388. See also the United States of America (Visiting Forces) Act 1942. With respect to areas of territory leased to another state for the purpose of the stationing there of armed forces on permanent bases see the Agreement relating to the Bases Leased to the United States of America (London, 27 March 1941; TS 2 (1941); Cmd 6259); amended by Exchanges of Notes (Washington, 18 January and 22 February 1946; TS 63 (1946); Cmd 7000; and Washington, 19 July and 1 August 1950; TS 65 (1950); Cmd 8076); and see *Hans v R* [1955] AC 378, 7 BILC 884, PC.

4 I.e. the Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty (London, 19 June 1951; TS 3 (1955); Cmd 9363), known as the NATO Status of Forces Agreement: see PARA 325. But note also the agreement between the member states of the European Union concerning the status of military and civilian staff seconded to the institutions of the EU: see the EU Status of Forces Agreement (EU SOFA) (Brussels, 17 November 2003; EC 2 (2009); Cm 7572); and Satow's Diplomatic Practice (6th Edn, 2009) pp 313-314.

5 I.e. to immunity in respect of governmental acts and activities only: see PARA 243. The State Immunity Act 1978 Pt I (ss 1-7: see PARA 244 et seq) does not apply to actions against foreign states in respect of their armed forces: see s 16(2); and PARA 259. Nor does the Visiting Forces Act 1952 (see PARA 325) apply: see *Littrell v United States of America* [1994] 4 All ER 203, [1995] 1 WLR 82, CA (state immune: treatment of member of its armed forces in its own military hospital is a governmental activity); *Holland v Lampen-Wolfe* [2000] 3 All ER 833, [2000] 1 WLR 1573, HL; affg [1999] 1 WLR 188, CA (state immune: provision of education for members of a state's own armed forces is a governmental activity).





Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(10) ARMED FORCES/325. The NATO Status of Forces Agreement and Visiting Forces Act 1952.

### **325. The NATO Status of Forces Agreement and Visiting Forces Act 1952.**

The jurisdictional competence of the authorities of a visiting force (the 'sending state') and of the state on whose territory the force is stationed (the 'receiving state') are regulated by what is known as the NATO Status of Forces Agreement<sup>1</sup>. The Visiting Forces Act 1952 was enacted in order that the United Kingdom could become a party to the Agreement<sup>2</sup>. In general the military authorities of the sending state may exercise criminal and disciplinary jurisdiction within the receiving state over all persons subject to the military law of the sending state and committing offences against that law<sup>3</sup>. This jurisdiction is exclusive in respect of offences which are punishable only by the law of the sending state and not by the law of the receiving state<sup>4</sup>. The receiving state may punish any breach of its own law by members of the visiting force and their dependants<sup>5</sup>. This jurisdiction is exclusive with respect to offences punishable only by the law of the receiving state and not by the law of the sending state<sup>6</sup>. Where there exists concurrent jurisdiction in both states, the military authorities of the sending state have the primary right to exercise jurisdiction over a member of the force or a civilian component in relation to offences committed solely against the property or security of that state or against the person or property of another member of the force or civilian component or a dependant, and offences arising out of any act or omission done in the performance of official duty<sup>7</sup>. The receiving state has the primary right to exercise jurisdiction in any other case<sup>8</sup>. Either state may waive its jurisdiction, and the state with the primary right may request the other state to do so<sup>9</sup>.

1 The Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty (London, 19 June 1951; TS 3 (1955); Cmd 9363) (amended by the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris, 28 August 1952; TS 81 (1965); Cmd 2777); and the Agreement Supplementary to the Agreement of 1951 (Bonn, 3 August 1959; TS 74 (1963); Cmd 2192)).

2 See the Visiting Forces Act 1952 ss 1-14; and **ARMED FORCES**. The Act is not confined (as is the Agreement) to members of the armed forces of countries which are members of the North Atlantic Treaty Organisation. See also the International Headquarters and Defence Organisation Act 1964; and PARA 326. As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

3 Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty art VII para 1(a). See also Fleck *The Handbook of the Law of Visiting Forces* (2001) p 108.

4 Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty art VII para 2(a).

5 Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty art VII para 1(b).

6 Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty art VII para 2(b).

7 Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty art VII para 3(a). As to the meaning of 'security' see art VII para 2(c).

8 Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty art VII para 3(b). The military authorities of the sending state may not exercise authority over nationals of the receiving state or persons ordinarily resident there unless they are members of the forces of the sending state: art VII para 4.

9 Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty art VII para 3(c). Provision is also made for mutual assistance, and for custody and sentencing of offenders (art VII paras 5-7), for the avoidance of double jeopardy (art VII para 8), and for securing a fair trial (art VII para 9).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/11. JURISDICTIONAL IMMUNITIES/(10) ARMED FORCES/326. International headquarters and defence organisations.

**326. International headquarters and defence organisations.**

Where, in pursuance of any arrangement for common defence to which the United Kingdom<sup>1</sup> government is for the time being a party, any international headquarters or defence organisation has been or is about to be set up, an Order in Council may be made designating the headquarters or organisation and conferring upon it the legal capacity of a body corporate and, to the extent specified, immunity from legal process and the like privileges as respects the inviolability of official archives as are accorded to an envoy of a foreign power accredited to the United Kingdom<sup>2</sup>.

1 As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

2 International Headquarters and Defence Organisations Act 1964 s 1. See the International Headquarters and Defence Organisations (Designation and Privileges) Order 1965, SI 1965/1535 (amended by SI 1987/927; SI 1994/1642; SI 1999/1735; SI 2009/704). As to the inviolability of diplomatic archives see PARA 268. See further **ARMED FORCES**.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/12. INTERNATIONAL RESPONSIBILITY/(1) INTRODUCTION/327. In general.

## **12. INTERNATIONAL RESPONSIBILITY**

### **(1) INTRODUCTION**

#### **327. In general.**

The concern of the law of international responsibility is to identify and set out the conditions which must be fulfilled in order for responsibility to arise, as well as to regulate the content and implementation of that responsibility<sup>1</sup>. Historically, the law of international responsibility developed principally in relation to the international responsibility of states, and for this reason reference has often been made merely to the law of state responsibility. However, with the recognition of the international legal personality of other actors, in particular international organisations and that such actors may be the possessors of rights and owe obligations under international law<sup>2</sup>, it has been recognised that there exists a wider law of international responsibility encompassing the responsibility of international organisations. However, given the relative paucity of practice in relation to the responsibility of international organisations, in many aspects the rules proposed have been developed on the basis of an analogy with the parallel rules under the law of state responsibility.

<sup>1</sup> As to the notion of internationally wrongful acts see PARA 336 et seq; as to the content of international responsibility see PARA 373.

<sup>2</sup> See *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* ICJ Reports 1949, 174 at 179; and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* ICJ Reports 1999, 62 at 88. See also PARA 355 et seq.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/12. INTERNATIONAL RESPONSIBILITY/(1) INTRODUCTION/328. The work of the International Law Commission in the field of international responsibility.

### **328. The work of the International Law Commission in the field of international responsibility.**

The modern law of international responsibility has to a very large extent been shaped by the work of the International Law Commission ('ILC')<sup>1</sup>, in particular its long-running examination of the topic of state responsibility, as well as its work on diplomatic protection, responsibility of international organisations and liability for acts not prohibited by international law. The topic of state responsibility was included in the original plan of work for the ILC. A complete set of draft Articles was eventually adopted on first reading by the International Law Commission in 1996<sup>2</sup>. The process of second reading was finally completed in 2001, resulting in the adoption by the ILC of the draft Articles on the Responsibility of States for Internationally Wrongful Acts<sup>3</sup>. Upon consideration by the General Assembly in 2001, the draft Articles were commended to the attention of states and the General Assembly annexed them to its resolution; they thereby became the Articles on Responsibility of States for International Wrongful Acts<sup>4</sup>. The General Assembly deferred consideration of what further action, if any, to take in relation to the Articles, including whether to convene an international diplomatic conference to conclude a multilateral treaty based on the Articles, until 2004 when the Articles were once again commended to the attention of states and further consideration was deferred until 2007<sup>5</sup>. In 2007 consideration of the question was again deferred until 2010<sup>6</sup>.

A sub-topic of the law of state responsibility, concerning the specific rules relating to the institution of diplomatic protection, has also been the subject of study by the ILC<sup>7</sup>. In 2006 the ILC adopted the draft Articles on Diplomatic Protection on second reading, together with accompanying Commentaries<sup>8</sup>, and the General Assembly took note of the draft and invited governments to submit their comments<sup>9</sup>. In 2007 the General Assembly commended the Articles on Diplomatic Protection to the attention of governments, and it was decided that the question of what action to take, including whether to conclude a multilateral convention on the basis of the Articles on Diplomatic Protection, would be examined by a working group in 2010<sup>10</sup>.

Following completion of its work on state responsibility, the ILC turned its attention to the topic of international responsibility of international organisations, provisionally adopting draft Articles on Responsibility of International Organization on first reading in 2009<sup>11</sup>.

The ILC has also studied the topic of international liability for injurious consequences arising out of acts not prohibited by international law<sup>12</sup>. Its work has in particular focused on questions resulting from transboundary environmental harm resulting from lawful but potentially hazardous activities and it adopted draft Articles on Prevention of Transboundary Harm from Hazardous Activities, together with accompanying Commentaries in 2001<sup>13</sup>, and draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, together with accompanying Commentaries in 2006<sup>14</sup>. The extent to which either draft represents a codification of customary international law, rather than progressive development, is far from clear<sup>15</sup>.

1 The International Law Commission is a subsidiary body of the General Assembly of the United Nations; it was established and its statute (since amended) was adopted by United Nations General Assembly Resolution 174 (II) of 21 November 1947. The Commission has as its object the promotion of the progressive development of international law and its codification: see the Statute of the International Law Commission art 1 para 1; and the Charter of the United Nations (San Francisco 25 June 1945; TS 67 (Cmd 7015)) art 13 para 1. For these purposes, 'progressive development' is understood as meaning the preparation of conventions on subjects which have not yet been regulated by international law or in relation to which the law has not yet been

sufficiently developed in the practice of states, while 'codification' is understood to mean the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine: see the Statute of the International Law Commission art 15; and see further arts 16-24. Despite the division between the two approaches envisaged by the Statute of the ILC, as a matter of practice, most topics examined by the Commission involve elements of codification coupled with some measure of progressive development.

2 See the Report of the International Law Commission, 48th Session, A/51/10, YILC 1996, vol II(2), pp 58-65.

3 For the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') and accompanying Commentaries see the Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2), pp 26-30. ARSIWA and the ILC's accompanying Commentaries are also reproduced in Crawford *The International Law Commission's Articles on State Responsibility* (2002).

4 See United Nations General Assembly Resolution 56/83 of 12 December 2001.

5 See United Nations General Assembly Resolution 59/35 of 2 December 2004. For discussion of the positions taken by states during the debate in 2004, see Crawford and Olleson 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 ICLQ 959.

6 See United Nations General Assembly Resolution 62/61, of 6 December 2007.

7 As to the law of diplomatic protection see PARA 383 et seq.

8 See the Report of the International Law Commission, 58th Session (2006), A/61/10, ch IV.

9 See United Nations General Assembly Resolution 61/35 of 4 December 2006. For government comments thereon see the Report of the Secretary-General A/62/118 (2007).

10 See United Nations General Assembly Resolution 62/67 of 6 December 2007.

11 For the draft Articles on Responsibility of International Organizations ('DARIO') and accompanying draft Commentaries see the Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. Although dealing principally with questions of the responsibility of international organisations, DARIO also deal with a number of questions relating to the responsibility of states in connection with the activities of international organisations: see draft art 1(2); and see also draft arts 57-62.

12 As to the distinction between international responsibility for internationally wrongful acts and international liability for lawful acts see PARA 334.

13 See the Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2), pp 146-148. For the action of the General Assembly in relation to the draft Articles on prevention see United Nations General Assembly Resolutions 56/82 of 12 December 2001, and 62/68 of 6 December 2007 by which the Articles on prevention, the text of which was annexed to the resolution, were commended to the attention of governments without prejudice as to any future action.

14 See the Report of the International Law Commission, 58th Session (2006), A/61/10, ch v For the action of the General Assembly in relation to the draft Principles on allocation of loss see United Nations General Assembly Resolution 61/36 of 4 December 2006 by which the Principles, the text of which was annexed to the resolution, were commended to the attention of governments without prejudice as to any future action. See also General Assembly Resolution 62/68 of 6 December 2007.

15 As to the distinction between codification and progressive development in the work of the ILC see note 1.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/12. INTERNATIONAL RESPONSIBILITY/(1) INTRODUCTION/329. Objective responsibility and responsibility as the corollary of an internationally wrongful act.

### **329. Objective responsibility and responsibility as the corollary of an internationally wrongful act.**

The commission of an internationally wrongful act engages the responsibility under international law of the state or international organisation responsible for the act or omission and entails secondary obligations, including in particular the obligation to make reparation for any damage caused<sup>1</sup>. In this sense, international responsibility is objective, in that the various secondary obligations which form the content of international responsibility come into being merely upon the occurrence of an internationally wrongful act<sup>2</sup>. Although traditionally international responsibility was seen as the corollary of the breach of a right, resulting primarily in the obligation of the responsible state to make reparation to the state whose right was infringed<sup>3</sup>, the evolution of international law, in particular the growth of multilateral treaty obligations and the recognition of obligations giving effect to community interests (including the category of peremptory norms, and the parallel notion of obligations erga omnes) has resulted in a profound modification of this traditional position<sup>4</sup>. It appears that states may be entitled to invoke the secondary obligations constituting the objective international responsibility of the responsible state resulting from the breach of certain obligations even if they are not directly affected by the breach of the obligation in question<sup>5</sup>. Accordingly, it is probably now more correct to state that international responsibility is the corollary of an internationally wrongful act, that is to say, the breach of an international obligation, rather than that of the breach of a right.

1 As to internationally wrongful acts see PARA 336 et seq; and as to the obligation to make reparation see PARA 374.

2 As to the content of international responsibility and secondary obligations see PARA 373 et seq.

3 See eg *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 641 (1925); *Factory at Chorzów (Jurisdiction)* PCIJ Ser A No 9 at 21 (1927); *Factory at Chorzów* PCIJ Ser A No 17 at 29 (1928); *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* ICJ Reports 1949, 174 at 184; *Corfu Channel (United Kingdom v Albania)* ICJ Reports 1949, 4 at 23.

4 As to peremptory norms and obligations erga omnes see PARA 11.

5 Ie the invocation by a state or international organisation of the responsibility of a responsible state or international organisation where either the obligation in question is owed to a group of states or international organisations and is established for the protection of a collective interest of the group, or the obligation in question is owed to the international community as a whole (ie it is an obligation erga omnes): see the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 48, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); and the draft Articles on Responsibility of International Organizations ('DARIO') draft art 48, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. The International Law Commission in adopting ARSIWA art 48 expressly disavowed the restrictive approach taken by the International Court of Justice in relation to standing in *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* ICJ Reports 1966, 6: see ARSIWA, Commentary to Article 48, para (7).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/12. INTERNATIONAL RESPONSIBILITY/(1) INTRODUCTION/330. Distinction between primary and secondary rules.

### **330. Distinction between primary and secondary rules.**

In discussing the law of international responsibility, a distinction is often drawn between the primary rules of international law, which lay down the substantive obligations of states or other international actors, and the secondary rules which make up the law of international responsibility<sup>1</sup>. The law of international responsibility consists of the secondary rules which govern: (1) the circumstances in which conduct is to be regarded as attributable to a state or international organisation so as to be capable of giving rise to its international responsibility<sup>2</sup>; (2) when an international obligation has been breached by a state or international organisation, including questions of the extension in time of an internationally wrongful act<sup>3</sup>; (3) the circumstances which may be relied upon by way of defence or justification in relation to conduct for which a state or international organisation would otherwise incur international responsibility<sup>4</sup>; (4) the legal consequences which constitute international responsibility and which arise as a result of an internationally wrongful act<sup>5</sup>; and (5) the procedural or substantive preconditions for a state or international organisation to invoke the international responsibility of another state or international organisation for its internationally wrongful acts, as well as the circumstances in which the right to invoke responsibility may be lost<sup>6</sup>.

1 The validity of the distinction between primary and secondary rules underlies the entire approach of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA'): see eg Commentary to Article 1, paras (1)-(3), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2).

2 As to attribution see PARA 337 et seq.

3 As to breach of an international obligation for the purposes of international responsibility see PARA 359 et seq.

4 As to circumstances precluding wrongfulness see PARA 362 et seq.

5 As to the content of international responsibility see PARA 373 et seq.

6 As to invocation of responsibility by a state or international organisation which is injured by the internationally wrongful act see ARSIWA art 42; and the draft Articles on Responsibility of International Organizations ('DARIO') draft art 42, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. As to the conditions in which responsibility may be invoked by a state other than an injured state, or an international organisation other than an injured international organisation, see PARA 329 note 5. In invoking responsibility, a state or international organisation is required to give notice of its claim to the state or international organisation responsible; the notice of claim may specify both the conduct necessary to cease the internationally wrongful act, if it is continuing, as well as the form which the reparation claimed should take: see ARSIWA art 43; and DARIO draft art 43. Responsibility may not be invoked to the extent to which any claim is not brought in accordance with any applicable rule relating to nationality of claims, nor to the extent that any rule requiring exhaustion of local remedies is applicable and has not been complied with: see ARSIWA art 44; and DARIO draft art 44. As to the rules relating to nationality of claims for the purposes of claims brought by way of diplomatic protection see PARA 391 et seq; as to the requirement of exhaustion of local remedies in the context of diplomatic protection see PARA 405 et seq. The right to invoke responsibility may be lost either because it has been validly waived by the injured state or international organisation, or because the injured state or international organisation, is, by reason of its conduct, to be held to have validly acquiesced in the lapse of the claim: see ARSIWA art 45; and DARIO draft art 45; and see also *Russian Indemnity Case* 11 RIAA 421 (1912); *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* ICJ Reports 1992, 240; *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 37-38 (paras 43-44); and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (paras 292-295).





Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/12. INTERNATIONAL RESPONSIBILITY/(1) INTRODUCTION/331. The absence of any general requirement of fault or of damage.

### **331. The absence of any general requirement of fault or of damage.**

As a matter of the general law of international responsibility, the existence of an international wrongful act is ascertained objectively and there is no general requirement of fault, in the sense of either negligence or an intention to harm on the part of the state or its agent<sup>1</sup>. Nevertheless, by way of exception to that general principle and in application of the principle of *lex specialis*<sup>2</sup>, a particular primary rule of international law may require improper motives or a particular mental state in order for the act of which complaint is made in order to breach the obligation in question<sup>3</sup>. Similarly, proof that individuals whose conduct is attributable to the state and who are alleged to have committed the acts in question held the necessary specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such is required before the state itself will incur responsibility for genocide<sup>4</sup>.

Although in the past it was suggested that in order for international responsibility to arise it was necessary that an internationally wrongful act should cause some injury or damage, as a consequence of the consolidation of the objective nature of international responsibility it is now settled that there is no such general requirement<sup>5</sup>. Nevertheless, through application of the *lex specialis* principle and by way of derogation from the general secondary rules, a particular primary rule may require the occurrence of some injury or damage either to a state or to one of its nationals before there is a breach of the obligation in question<sup>6</sup>.

1 See eg *Neer Case* 4 RIAA 60 at 61, 62 (1926); *Roberts Case* 4 RIAA 77 at 80 (1926); *Caire* 5 RIAA 516 (1929). In determining whether international responsibility has been incurred, international tribunals have not in general inquired into the state of mind of the individual agent who caused the harm complained of, and states have been held liable for damage suffered as a result of errors of judgment in good faith on the part of states' agents: see PARA 337 et seq. In certain cases states have been held liable for omissions to prevent the occurrence of certain events which caused damage to another state by reason of a lack of due diligence on the part of the state caused by negligence of its agents, but such negligence is not a necessary condition of liability in such cases; this may occur because of a failure in the structure of the administration of the state or the insufficiency of the legal powers of the government of the state under its domestic law, which disables it from acting with the due diligence required of international law: see the *Alabama Arbitration* (1871) 61 BFSP 40. In *Corfu Channel (United Kingdom v Albania)* ICJ Reports 1949, 4 the International Court did not hold Albania liable to the United Kingdom for damage to British warships on the basis of any principle of fault or risk or absolute liability, but because Albania, which must have had knowledge of the existence of mines in its territorial sea, was in breach of its international obligations in not warning third states of the danger.

2 As to the *lex specialis* principle see PARA 332.

3 This is required, for example, in certain cases of denial of justice: see PARA 464.

4 See the Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948; TS58 (1970); Cmnd 4421) art II; and PARA 429. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007.

5 As to the objective nature of international responsibility see note 1.

6 As to the *lex specialis* principle see PARA 332.

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### **332. The *lex specialis* principle.**

The customary rules of international responsibility are residual, default rules which apply in relation to the ascertainment of the existence of an internationally wrongful act as well as its consequences<sup>1</sup>. To the extent that the relevant primary rule in question provides by way of *lex specialis* for different rules as to what acts are attributable to an international actor, when an internationally wrongful act has taken place, or the consequences of international responsibility consequent upon an internationally wrongful act, any such rules will apply to the exclusion of the customary rules of international responsibility<sup>2</sup>.

<sup>1</sup> See generally PARA 327 et seq.

<sup>2</sup> See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 55, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); and the draft Articles on Responsibility of International Organizations ('DARIO') draft art 63, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. See also the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 401) (where the International Court of Justice rejected an argument that, due to the particular nature of the crime of genocide, the applicable rules of attribution were different from those under the general customary international law of state responsibility, and observed that 'the rules for attributing alleged internationally wrongful conduct to a state do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*').

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/12. INTERNATIONAL RESPONSIBILITY/(1) INTRODUCTION/333. Relationship between the international law of responsibility and municipal law.

### **333. Relationship between the international law of responsibility and municipal law.**

The responsibility of a state in international law must be distinguished from any responsibility which it may bear as a matter of its own municipal law. From the viewpoint of international law, the content of municipal law is generally treated as a question of fact<sup>1</sup>. A number of consequences follow from that principle which are relevant for the purposes of the law of international responsibility: whether or not any particular conduct is internationally wrongful is governed by international law<sup>2</sup>, and accordingly a state cannot attempt to avoid international responsibility by invoking the provisions of its own municipal law, in particular by relying on the fact that an act was lawful (or unlawful) as a matter of municipal law<sup>3</sup>. Nor can it avoid responsibility by relying on the absence of rules in its municipal law, the existence of which might have led to the injury being avoided<sup>4</sup>, nor can it rely on the federal nature of its internal structure so as to justify non-compliance with its obligations<sup>5</sup>. That principle applies not only as regards compliance with the substantive obligations under the primary rules of international law, but also in relation to compliance with the secondary obligations of reparation and cessation arising as a matter of the international law of responsibility<sup>6</sup>. A state cannot seek to contest the entry into force of international obligations by reference to municipal law constraints which it failed to observe<sup>7</sup>. Further, a state cannot subsequently seek to overturn a finding of international responsibility by obtaining a judgment in its national courts which changes the basis on which that international finding of responsibility was made<sup>8</sup>. Nor can a state rely on its own error in the characterisation of an administrative act as a matter of domestic law in order to argue that domestic remedies were in fact available to an individual and should have been exhausted<sup>9</sup>. By contrast, if a particular person or entity is regarded as an organ of the state as a matter of domestic law, the state cannot argue to the contrary for the purposes of denying that the conduct of the organ is attributable to it for the purposes of determining whether it has committed an internationally wrongful act<sup>10</sup>. A breach of municipal law, or of a contract governed by domestic law, does not ipso facto result in a breach of international law, although in certain circumstances this may be the case<sup>11</sup>.

1 See *Certain German Interests in Polish Upper Silesia* PCIJ Ser A No 7 at 19 (1926).

2 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 3, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2). The International Law Commission has taken the view that it is not necessary to reiterate the principle in the context of the responsibility of international organisations: see the draft Articles on Responsibility of International Organizations ('DARIO') draft Commentary to draft article 4, paragraph (4), Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV.

3 This principle was recognised by the Permanent Court of International Justice in the *SS 'Wimbledon'* PCIJ Ser A No 1 at 29, 30 (1923); *Greco-Bulgarian Communities* PCIJ Ser B No 17 at 32 (1930); *Free Zones of Upper Savoy and District of Gex Case* PCIJ Ser A No 24 at 12 (1930); and PCIJ Ser A/B No 46 at 96 (1932); and *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* PCIJ Ser A/B No 44 at 24 (1932). See also *Acquisition of Polish Nationality* PCIJ Ser B No 7 at 26 (1923). For recognition of the principle by the International Court of Justice, see eg *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* ICJ Reports 1949, 174 at 180. Cf the specific parallel rule in the law of treaties prohibiting reliance on domestic law to justify non-performance of obligations arising under a treaty: see the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmd 7964) art 27; and para 91.

4 *Jurisdiction of the Courts of Danzig* PCIJ Ser B No 15 at 26-27 (1928); *Exchange of Greek and Turkish Populations* PCIJ Ser B No 10 at 19-22 (1925). In other cases the principle has been implicitly recognised and has been stated by judges in separate and dissenting judgments: see eg the *Application of the Convention of*

1902 *Governing the Guardianship of Infants (Netherlands v Sweden)* ICJ Reports 1958, 55 at 67, 74, 83, 125, 126, 128, 129, 137, 138, 140. Arbitral decisions make the same point, especially the *Alabama Arbitration* (1871) 61 BFSP 40; and see also *Norwegian Shipowners Case* 1 RIAA 307 (1922); *Tinoco Arbitration* 1 RIAA 369 at 386 (1923); *Pinson* 5 RIAA 327 at 393 (1928); *Shufeldt* 2 RIAA 1079 (1930).

5 *The 'Montijo'* (1875) Moore Int Arb 1421; *Pellat* 5 RIAA 534 at 536 (1929). See also *Garrido and Baigorria v Argentina (Reparations and Costs)* (1998) Inter-Am Ct HR (Ser C) No 39 para 38; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Advisory Opinion OC-16/99)* (1999) Inter-Am Ct HR (Ser A) No 16.

6 See ARSIWA art 32; and the cases cited in note 5. Cf the parallel rule relating to international organisations pursuant to which an international organisation cannot rely on its own internal rules as justification for a failure to comply with the secondary obligations under the law of international responsibility: see DARIO draft art 31.

7 See *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A/B No 46 at 96, 167, 170 (1932); *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53 at 22, 91-92 (1933). In relation to the law of treaties, see Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) arts 27, 46; and paras 91, 101.

8 *Factory at Chorzów* PCIJ Ser A No 17, at 33 (1928).

9 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (para 46). As to the requirement of exhaustion of domestic remedies as a precondition to the presentation of a claim by way of diplomatic protection see PARA 405 et seq.

10 See eg ARSIWA art 4(2), and Commentary to Article 4, para (11). See also the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 386).

11 *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15 at 74 (para 124); *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* ICSID Case No ARB/97/3, Decision on Annulment of 3 July 2002, at paras 95-97 (referring to ARSIWA art 3, and Commentary to Article 3, paras (4) and (7)). See also UN Human Rights Committee's General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para 4 (CCPR/C/21/Rev 1/Add 13), 26 May 2004. As to so-called 'umbrella' clauses in investment protection treaties see eg *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* ICSID Case No ARB/01/13, Decision on Objections to Jurisdiction of 6 August 2003; *SGS Société Générale de Surveillance SA v Republic of the Philippines* ICSID Case No ARB/02/6, Decision on Objections to Jurisdiction of 29 January 2004; and *Noble Ventures, Inc v Romania* ICSID Case No ARB/01/11, Award of 12 October 2005.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/12. INTERNATIONAL RESPONSIBILITY/(1) INTRODUCTION/334. International responsibility and international liability for lawful acts.

### **334. International responsibility and international liability for lawful acts.**

International responsibility arises upon the commission of an internationally wrongful act; responsibility is thus the corollary of the breach of an international obligation<sup>1</sup>. As such international responsibility is to be distinguished from what has come to be referred to as liability for acts not prohibited by international law<sup>2</sup>. The precise scope of the latter category is not entirely clear; a number of the leading cases often relied upon to justify the existence of liability as a separate category may be analysed as in fact concerning breach of an international obligation (and thus concerning questions of international responsibility properly so-called), or as concerning the quantification of damage where liability was not in fact disputed<sup>3</sup>.

1 See PARA 329.

2 For discussion of the International Law Commission's work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law see PARA 328. In general on the distinction between state responsibility and liability, see further Boyle 'State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?' (1990) 39 ICLQ 1.

3 See eg *Corfu Channel (United Kingdom v Albania)* ICJ Reports 1949, 4; *Trail Smelter* 3 RIAA 1905 (1935/1941). In addition, reference has been made to the provisions of international conventions which provide for strict liability for damage caused as the result of activities in particular spheres: see eg the Convention on International Liability for Damage caused by Space Objects (London, Moscow and Washington, 29 March 1972; TS 16 (1974); Cmnd 5551); and PARA 207 (although the duty imposed upon individuals under the Convention is not so strict). Under the provisions of several conventions strict liability is to be imposed, not upon the states parties themselves, but by those states upon persons within their jurisdictions and subject to their domestic laws: see eg the Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960; TS 69 (1968); Cmnd 3755). See also the Nuclear Installations Act 1965; and **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1487 et seq. There is also a Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963), which the United Kingdom has signed but not ratified: see **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1487; however, the United Kingdom has enacted legislation giving effect to the Convention: see **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1347. As to the imposition of strict liability upon individuals see also the International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1970); the Merchant Shipping Act 1995; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 347 et seq. The United Kingdom is not a party to the Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962; 57 American Journal of International Law 268) (not in force) which provides for liability of the operators of nuclear ships in case of accidents, whether the operator is a private entity or the state itself.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/12. INTERNATIONAL RESPONSIBILITY/(1) INTRODUCTION/335. Doctrine of abuse of rights.

### **335. Doctrine of abuse of rights.**

According to the doctrine of abuse of rights, a state may incur responsibility under international law for an improperly motivated exercise of a right whose exercise would otherwise be lawful. However, the existence, scope and conditions for application of the principle are not clearly established<sup>1</sup>.

<sup>1</sup> Reference has been made to the principle in cases where it was argued that a right had been exercised in order to cause damage without there being any advantage to the state entitled to exercise the right: *Certain German Interests in Polish Upper Silesia* PCIJ Ser A No 7 at 30 (1926); *Free Zones of Upper Savoy and District of Gex Case* PCIJ Ser A No 24 at 12 (1930); PCIJ Ser A/B No 46 at 96, 167 (1932). In each of those decisions, although implicitly recognising the existence of the principle, the Permanent Court held that an abuse of rights could not be presumed and had not been shown to exist on the facts of the case. The decision most frequently cited in this connection is arguably irrelevant, since it was based upon the absence of any right to carry out the activity in question and the injury was in any event held to be unlawful: see *Trail Smelter* 3 RIAA 1907 at 1965 (1935) (no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another).

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## **(2) THE INTERNATIONALLY WRONGFUL ACT AS THE SOURCE OF INTERNATIONAL RESPONSIBILITY**

### **(i) Introduction**

#### **336. Elements of an internationally wrongful act.**

The modern law of international responsibility, both of states and of international organisations, is based upon the concept of the 'internationally wrongful act'<sup>1</sup>. An internationally wrongful act consists of conduct which is both attributable to a state or international organisation and which is inconsistent with what is required of that state or international organisation by one or more of the international obligations binding upon it<sup>2</sup>. The bases on which conduct may be attributed to a state or to an international organisation are different, reflecting their different structural and functional characteristics<sup>3</sup>. The conduct constituting an internationally wrongful act may consist of either action or omission<sup>4</sup>.

In addition to the two positive conditions, namely that there should be conduct which is attributable and that that conduct should be in breach of an international obligation, it is also necessary that there should not exist any circumstance which precludes the wrongfulness of the conduct in question<sup>5</sup>. Further in certain specific circumstances, a state or international organisation may engage its international responsibility as the result of its involvement or complicity in the internationally wrongful act of another state or international organisation<sup>6</sup>.

1 As to international responsibility as the corollary of an internationally wrongful act see PARA 329.

2 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 2, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); and the draft Articles on Responsibility of International Organizations ('DARIO') draft art 4, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. For statements by the International Court of Justice in this sense see *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3 at 29 (para 56); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (paras 385-386).

As to the requirement of attributability of conduct see ARSIWA art 2(a); and see generally Commentary to Article 2, paras (5)-(6), and Introductory Commentary to Part One, Chapter II. See also the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (paras 379, 385) and PARA 337 et seq. For the equivalent position in relation to international organisations see DARIO art 4(a); and PARA 355 et seq. As to the requirement of breach of an international obligation see ARSIWA art 2(b); and see generally Commentary to Article 2, paras (7)-(8). For the equivalent position in relation to international organisations see DARIO art 4(b). See further PARA 359 et seq.

3 As to attribution of conduct to states see PARA 337 et seq; as to attribution of conduct to international organisations see PARA 355 et seq.

4 See ARSIWA art 2; Commentary to Article 2, para (4); and DARIO draft art 4.

5 See PARA 362 et seq.

6 See PARA 369 et seq.



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## **(ii) Attribution of Conduct**

### **A. ATTRIBUTION OF CONDUCT TO STATES**

#### **337. In general.**

The bases on which conduct may be attributed to a state for the purposes of state responsibility are relatively settled. The rules relating to attribution as codified in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts<sup>1</sup> apply solely for the purposes of determining whether a state has committed an internationally wrongful act<sup>2</sup>, and are not as such applicable for the purpose of determining whether conduct is attributable to the state for any other purpose<sup>3</sup>. International law provides for particular rules governing attribution in other specific circumstances, for instance those governing which organs of a state are able to bind it in undertaking international treaty obligations<sup>4</sup>. Nevertheless, the rules of attribution which apply in order to determine whether conduct is attributable to the state for the purposes of the law of state responsibility may be of assistance in ascertaining which organs, entities and individuals enjoy sovereign immunity before the courts<sup>5</sup>.

It is generally accepted that for the purposes of state responsibility, conduct may be attributed to a state on the following bases:

- 85 (1) where it is conduct of an organ of the state, whether de jure or de facto<sup>6</sup>;
- 86 (2) where it is conduct of persons or entities who are not formally organs of the state, but which nevertheless exercise elements of its governmental authority<sup>7</sup>;
- 87 (3) where it is conduct of an organ of another state which has been placed at the disposal of the state<sup>8</sup>;
- 88 (4) where it is conduct of persons or entities acting on the instructions or under the direction or control of the state<sup>9</sup>;
- 89 (5) exceptionally where it is conduct of an insurgent or other movement which succeeds in becoming the government of a state, or succeeds in establishing a new state on the territory of a pre-existing state<sup>10</sup>;
- 90 (6) where it is conduct of persons or groups who are exercising elements of governmental authority in the absence or default of the official authorities<sup>11</sup>; and
- 91 (7) where the state acknowledges or adopts the particular conduct as its own<sup>12</sup>.

Apart from the specific recognised bases of attribution, in general a state will not incur responsibility for the conduct of private individuals. However, it may nevertheless incur responsibility for its own failures or omissions in preventing or failing to punish the actions of such private individuals<sup>13</sup>.

1 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA'), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2)(5).

2 See PARA 336.

3 Although the rules of attribution for such other purposes may have the same or very similar content: see eg *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America) (Mexico v United States of America) (Provisional Measures)* ICJ Reports, 16 July 2008 (paras 55-56); and see the Joint Dissenting Opinion of Judges Owada, Tomka and Keith (paras 15-17); the Dissenting Opinion of Judge Buergenthal (paras 13, 23); and the Dissenting Opinion of Judge Skotnikov (paras 2-5).

4 See the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) arts 7, 8, 46 and 47; and PARAS 73-74, 101.

5 See *Jones v Ministry of Interior of Saudi Arabia; Mitchell v Al-Dali* [2006] UKHL 26, [2007] 1 AC 270, at [10]-[13] per Lord Bingham, and at [74]-[78] per Lord Hoffman (referring to ARSIWA arts 4, 7, 8, and passages from the accompanying Commentaries).

6 See PARAS 338-344.

7 See PARA 345.

8 See PARA 347.

9 See PARA 348.

10 See PARA 349.

11 See PARA 350.

12 See PARA 351.

13 See PARAS 352-354.

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### **338. Acts of organs: general considerations.**

The primary basis of attribution for the purposes of the law of state responsibility is that the conduct of any organ of the state is considered to be an act of the state and thus to be attributable to it under international law<sup>1</sup>. For these purposes, the notion of 'organ' covers all of the individual or collective entities which go to make up the organisation of the state and act on its behalf<sup>2</sup>. It is irrelevant whether the organ in question exercises legislative, executive, judicial or other functions<sup>3</sup>. Further, the position the organ in question holds within the organisation of the state, whether of the central government or a territorial governmental entity is irrelevant<sup>4</sup>. Conduct of an organ is attributable whether or not the conduct in question was ultra vires or otherwise illegal under the domestic law of the state in question<sup>5</sup>.

1 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 4(1), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2). Article 4 has been endorsed by the International Court of Justice as reflecting customary international law: see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (para 160); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 385). For endorsement of an earlier version of the provision which became ARSIWA, art 4 see *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* ICJ Reports 1999, 62, at 87 (para 62). See also *LaGrand (Germany v United States of America) (Provisional Measures)* ICJ Reports 1999, 9 at 16 (para 28).

2 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 388). An organ also includes any person or entity which has that status in accordance with the internal law of the state: ARSIWA art 4(2).

3 See ARSIWA art 4(1).

4 See ARSIWA art 4(1).

5 See PARA 339.

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### **339. Acts of organs: municipal and federal entities.**

A state incurs responsibility for the acts and omissions of its municipal and regional officials, courts and legislatures, whatever position the organ holds in the organisation of the state and whatever its character as an organ of the central government or of a territorial unit of the state<sup>1</sup>. A state having a federal structure incurs responsibility for the acts and omissions of its component entities if the federal state has the sole authority to represent the state internationally<sup>2</sup>.

1 *Pieri Dominique & Co* 10 RIAA 139 at 156 (1905); *Heirs of the Duc de Guise* 13 RIAA 150 at 161 (1951-53).

2 See eg *LaGrand (Germany v United States of America) (Provisional Measures)* ICJ Reports 1999, 9 at 16 (para 28). For older cases, see eg *Montijo* (1875) Moore Int Arb 1421; *De Brissot and Others* (1885) Moore Int Arb, 2967, at 2970-2971; *The 'William Yeaton'* (1885) Moore Int Arb 2944 at 2967; *Davy* 9 RIAA 467 (1903); *Pieri Dominique & Co* 10 RIAA 139 at 156 (1905); *Janes Case* 4 RIAA 82 at 86 (1926); *Swinney Case* 4 RIAA 98 (1926); *Quintanilla* 4 RIAA 101 (1926); *Youmans Case* 4 RIAA 110 (1926); *Mallén Case* 4 RIAA 173 (1927); *Venable* 4 RIAA 219 at 230 (1927); *Tribolet Case* 4 RIAA 598 (1930); *Pellat* 5 RIAA 534 (1929); see also the case of lynching of Italian nationals at issue in *Italians at New Orleans* (1891) 6 Moore's Digest 837. The rule is based upon the principle that a state cannot rely upon its own municipal law, including constitutional law, in order to avoid its international responsibility: see PARA 333. Since 1875 the only cases in which it has been denied appear to be *Tunstall*, Foreign Relations of the United States 1885, 450, and *The 'William Yeaton'*.

In *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 the United States did not contest that it was responsible for the acts of the relevant law enforcement authorities and agencies of the federal sub-units in question. In *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America) (Mexico v United States of America) (Provisional Measures)* ICJ Reports, 16 July 2008 (para 77), the Court noted the express recognition by the United States that it was responsible under international law for the actions of its political subdivisions, including federal, state and local officials.

In addition, a state may also be responsible for events which take place in a dependent state which it represents internationally, although such relationships are now relatively rare: see eg *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 (1925) (protected state); *Mavrommatis Palestine Concessions* PCIJ Ser A No 2 (1924) (mandated territory); *Studer* 6 RIAA 149 (1925) (protectorate).

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### 340. Acts of organs: the executive.

In accordance with the general principle of attribution of the acts of organs, a state may incur international responsibility for acts of the executive and executive officers<sup>1</sup>. For this purpose no distinction is drawn between the acts of superior and inferior state authorities and officials<sup>2</sup>. Thus, the conduct of a very wide range of officials has been held to be attributable and as capable of giving rise to the responsibility of states: this is the case for example of conduct of various types of law enforcement officials<sup>3</sup>, members of the armed forces<sup>4</sup>, a railway superintendent<sup>5</sup>, a receiver or administrator of property<sup>6</sup> and a mayor<sup>7</sup>. In the case of individuals who constitute organs of the state, conduct is only attributable when the individual is in fact acting in that capacity<sup>8</sup>.

1 See generally *El Triunfo* 15 RIAA 455 at 477 (1902).

2 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 4(1), and Commentary to Article 4, para (7), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2). Historically, a distinction was drawn by some writers between superior and inferior authorities, on the basis that responsibility could be incurred only by acts of superior officials; in relation to the acts of inferior officials, the state would only be responsible for a failure to punish the officer: see Harvard Research Draft Convention, art 7 (23 American Journal of International Law Supp 133 at 165-167); Borchard, *Diplomatic Protection of Citizens Abroad*, at 189, 190. In most of the cases referred to in support of this view the claim failed because the alien had not exhausted local remedies: see eg *Bensley* (1850) Moore Int Arb 3016; *Slocum* (1876) Moore Int Arb 3140; *Leichardt* (1868) Moore Int Arb 3133. The approach was expressly rejected in *Moses* (1871) Moore Int Arb 3127 at 3129; *Roper Case* 4 RIAA 145 (1927); *Massey Case* 4 RIAA 155 (1927); *Way* 4 RIAA 391 at 400 (1928); *Baldwin* 6 RIAA 328 (1933); *Currie* 14 RIAA 21 at 24 (1954); *Dispute concerning the interpretation of Article 79 of the Italian Peace Treaty* 13 RIAA 389 at 431-432 (1955); and *Mossé* 13 RIAA 486 at 492-493 (1953). As to the irrelevance of the position of the official or authority in the organisation of the state see PARA 339.

3 Eg police officers (*Maal Case* 10 RIAA 730 (1903); see also *Roper Case* 4 RIAA 145 (1927); *Brown, Sanders and Small* 4 RIAA 149 (1927); *Mallén Case* 4 RIAA 173 (1927); *Way* 4 RIAA 391 (1928); *Pugh* 3 RIAA 1439 (1933); *Richeson* 6 RIAA 325 (1933); *Mossé* 13 RIAA 486 at 492 (1953); *Menghi* 13 RIAA 801 (1958)); a deputy sheriff (*Quintanilla* 4 RIAA 101 (1926)); a jailhouse keeper (*Massey Case* 4 RIAA 155 (1927)); and customs officers (*Compagnie Générale des Asphaltes de France* 9 RIAA 389 (1903); *Pieri Dominique & Co* 10 RIAA 139 (1905); *Coquitlam* 6 RIAA 45 (1920); *The Jessie, The Thomas F Bayard and The Pescawha* 6 RIAA 57 (1921); *The 'Wanderer'* 6 RIAA 68 (1921); *The 'Kate'* 6 RIAA 77 (1921); *The 'Favourite'* 6 RIAA 82 (1921); *Union Bridge Co* 6 RIAA 138 (1924); *Koch* 4 RIAA 408 (1928)).

4 See *Jeannotat* (1875) Moore Int Arb 3673; *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 (1925); *Swinney Case* 4 RIAA 98 (1926); *Falcón* 4 RIAA 104 (1926); *Youmans Case* 4 RIAA 110 (1926); *Connelly* 4 RIAA 117 (1926); *García and Garza Case* 4 RIAA 119 (1926); *Munroe* 4 RIAA 538 (1929); *Caire* 5 RIAA 516 at 516 (1929); *Ruiz* 6 RIAA 345 (1933); *Díaz* 6 RIAA 341 (1933). See also *Chevreau* 2 RIAA 1113 (1931); *Responsibility of Germany for Damage Caused to Portuguese Colonies ('Naulilaa')* 2 RIAA 1011 (1928); *Eis* 30 ILR 116 (1959); *The 'Rainbow Warrior' (ruling of the Secretary-General)* 19 RIAA 199 (1986), 26 ILM 1346; *Rainbow Warrior (New Zealand/France)* 20 RIAA 215 (1990). The conduct of auxiliaries is also attributable: *Stephens Case* 4 RIAA 265 (1927); and *The 'Zafiro'* 6 RIAA 160 (1925). As to acts of soldiers unaccompanied by an officer see *Solis* 4 RIAA 358 at 362-363 (1928); *Kling* 4 RIAA 575 at 578-581 (1930). As a matter of customary international law, a state party to an armed conflict is responsible for all actions of the members of its armed forces during that conflict: as to war crimes see PARA 431.

5 *Venable* 4 RIAA 219 (1927).

6 See *Currie* 14 RIAA 21 at 24 (1954); *Société Verdol* 13 RIAA 9 (1949); *Ousset* 13 RIAA 252 (1954).

<sup>7</sup> *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15. Cf *Sancheti v City of London* [2008] EWCA Civ 1283, [2009] 1 Lloyd's Rep 117, [2008] All ER (D) 204 (Nov) (held that although the acts of the Corporation of London may be attributable to the United Kingdom as a matter of international law for the purposes of a claim by a foreign investor for breach of a bilateral investment treaty, this did not mean that an action before the English courts by the Corporation of London to recover rent against the investor had to be stayed as in breach of the arbitration agreement contained in the treaty; the Corporation of London was not party to the arbitration agreement, which was with the United Kingdom, and was therefore not bound by it).

<sup>8</sup> In relation to the attributability of ultra vires acts see PARA 346; for the non-attributability of private acts of officials see PARA 352.

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**341. Acts of organs: members of the armed forces during armed conflict.**

The acts of members of the armed forces of a state will normally be attributable to it as conduct of an organ of the state<sup>1</sup>. Further, it appears that as a matter of customary international law, during an armed conflict a state party to the conflict is responsible for all acts of persons forming part of its armed forces<sup>2</sup>.

1 See PARA 340.

2 See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (paras 213-214, 243); cf the Dissenting Opinion of Judge ad hoc Kateka ICJ Reports 2005, 361 at 377-378 (para 54).

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### 342. Acts of organs: the legislature.

The acts of the legislature of a state, including the adoption of legislation which is inconsistent with the state's international obligations, are attributable to it under international law and may give rise to its international responsibility<sup>1</sup>. In accordance with the general principle of attribution of the acts of all organs of the state, for these purposes it is irrelevant whether the legislature is the central legislature or that of a territorial sub-unit<sup>2</sup>. It is not clear to what extent the actions of individual members of a legislature (whether federal or provincial) may be attributable to the state<sup>3</sup>. Whether or not the mere enactment or maintenance of legislation will, without more, give rise to the international responsibility of the state in question depends on the substance and content of the primary obligation in question: for instance, the potential applicability of legislation to an individual (even if not applied in practice), or a high probability that legislation will be applied to his situation in the future, may result in a breach of the state's international human rights obligations<sup>4</sup>. By contrast, in the case of a claim brought by a state by way of diplomatic protection on behalf of one of its nationals, it may be necessary to establish that the alien has in fact suffered damage as a result of the application of the legislation in question: for instance, the adoption of a law which renders property of a foreign national liable to expropriation will not normally constitute a breach of international law and it is only when the legislation is in fact applied to the individual and there is interference with the individual's property that an international claim for expropriation will arise<sup>5</sup>. On the other hand, the acts or omissions of the legislature may produce liability without more: for instance where an obligation arising under a treaty requires that a particular result be achieved by legislation or particular terms of the treaty are to be incorporated into domestic law and this is not done, or where on a reasonable construction of a treaty, the domestic legislation in question constitutes a clear breach of the treaty<sup>6</sup>.

1 See eg *El Triunfo* 15 RIAA 455 at 477 (1902); *Certain German Interests in Polish Upper Silesia* PCIJ Ser A No 7 at 19 (1926). The question whether a state should be held responsible for, inter alia, acts committed by its legislature was considered in: *German Settlers in Poland (Advisory Opinion)* PCIJ Ser B No 6 at 35-36 (1923); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* PCIJ Ser A/B No 44 at 4, 24-25 (1932); *Phosphates in Morocco* PCIJ Ser A/B No 74 at 10, 25-26 (1938); *Rights of Nationals of the United States of America in Morocco (France v United States of America)* ICJ Reports 1952, 176; *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States of America)* (Jurisdiction) ICJ Reports 1954, 19; *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)* ICJ Reports 1958, 55. See also *Norwegian Shipowners Case* 1 RIAA 307 (1922); *Tinoco Arbitration* 1 RIAA 369 at 375 (1923); *Shufeldt* 2 RIAA 1079 at 1083 (1930).

2 See PARA 339.

3 See *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic ('Vivendi II')* ICSID Case No ARB/97/3, Award of 20 August 2007, at para 7.4.44 (although the respondent state expressly accepted that it was responsible for acts of the legislature in the exercise of its governmental authority, it denied that it was responsible for the acts of individual members of the opposition, and the Tribunal abstained from expressing a view as to whether the acts of individual members of a legislature were attributable to the state).

4 See, for example, the approach of the European Court of Human Rights to the question of whether an individual can claim to be the victim of a violation of Convention rights as the result of legislation which has not in fact been applied to him: see eg *Klass v Federal Republic of Germany* A 28 (1978) 2 EHRR 214, ECtHR; *Marckx v Belgium* A 31 (1979) 2 EHRR 330, ECtHR; *Dudgeon v United Kingdom* A 45 (1981) 4 EHRR 149, ECtHR; *Johnston v Ireland* A 112 (1986) 9 EHRR 203, ECtHR; *Norris v Ireland* A 142 (1988) 13 EHRR 186, ECtHR; *Modinos v Cyprus* A 259 (1993) 16 EHRR 485, ECtHR; *Burden v United Kingdom* [2008] STC 1305, ECtHR.



5 *Mariposa Development Co* 6 RIAA 338 (1933). As to diplomatic protection see PARA 385 et seq.

6 For the Panama Canal Tolls controversy in 1913 between Great Britain and the United States see McNair's Law of Treaties 547-550; 6 Hackworth's Digest 59. See also *Phosphates in Morocco* PCIJ Ser A/B No 74 (1938).

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### **343. Acts of organs: courts and the judiciary.**

A state may incur responsibility in international law by reason of the acts of its courts and the judiciary<sup>1</sup>. This is particularly the case in relation to a claim of denial of justice in breach of customary international law brought by a state by way of diplomatic protection of a national, but responsibility may also arise by reason of acts of the courts or judiciary in other circumstances<sup>2</sup>. Although the judiciary may be independent of interference by the executive, it nevertheless constitutes, for the purposes of international law, an organ of the state such that its acts are attributable to the state<sup>3</sup>.

1 See eg: *Lotus Case* PCIJ Ser A No 10 (1927); *Jurisdiction of the Courts of Danzig* PCIJ Ser B No 15 (1928); *Phosphates in Morocco* PCIJ Ser A/B No 74 (1938); *Ambatielos (Greece v United Kingdom)* ICJ Reports 1953, 10; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* ICJ Reports 1999, 62 at 87 (para 62).

2 As to denial of justice see PARA 464.

3 To the extent that earlier decisions (eg *Croft* (1856) 50 BFSP 1288; *Yuille Shortridge* 2 Lapradelle and Politis, *Recueil des Arbitrages Internationaux* 78 (1861)) suggest otherwise, they must now be regarded as incorrect on this point.

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#### **344. Acts of organs: de facto organs.**

Persons, groups of persons or entities may be equated with state organs even if that status does not follow from the internal law of the state provided that in fact the person, group of persons or entity acts in 'complete dependence' on the state, of which in reality they are ultimately merely the instrument<sup>1</sup>. However, attribution to a state on this basis is exceptional, in so far as it requires a particularly high degree of control<sup>2</sup>. Where such a great degree of control is found to exist, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the state to which he is so closely attached as to appear to be nothing more than its agent<sup>3</sup>. Attribution of conduct to a state on the basis that the person, group of persons or entity carrying out the conduct is a de facto organ is to be distinguished from attribution of persons or entities which are not organs of the state but whose conduct is nevertheless attributable on the basis that they act under the state's direction and control<sup>4</sup>. In the case of de facto organs, once the requisite high degree of dependence is proved, all conduct of the de facto organ performed in such capacity is attributable to the state for the purposes of international responsibility<sup>5</sup>. By contrast, in the case of attribution on the basis of instructions, direction or control by a state it is necessary to demonstrate that the conduct complained of was carried out under the 'effective control' of the state<sup>6</sup>.

1 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (paras 391, 397); and see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Reports 1986, 14 at 62-63 (paras 109-110).

2 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 393). The justification for this exceptional approach is that any other solution would allow states to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 391); and see the Dissenting Opinion of Judge ad hoc Mahiou (para 103).

3 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 392).

4 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (paras 384, 397). As to attribution on the basis of direction and control see PARA 348.

5 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 397).

6 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 400).

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**345. Acts of persons or entities exercising elements of governmental authority.**

The conduct of a person or entity which is not an organ of the state but which is empowered under the state's domestic law to exercise elements of governmental authority is attributable to the state provided that the person or entity was acting in that capacity in committing the conduct in question<sup>1</sup>. Attribution of conduct on this basis extends to the conduct of parastatal entities which are empowered to exercise elements of governmental authority in place of state organs, and state corporations which have been privatised but which retain certain governmental or regulatory functions<sup>2</sup>. As with the acts of organs, conduct of a person or entity exercising elements of governmental authority is attributable even if the particular conduct carried out in exercise of governmental authority was ultra vires or otherwise illegal under the domestic law of the state<sup>3</sup>.

1 See Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 5, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2). See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (para 160) (where ARSIWA art 5 was cited with apparent approval); *Noble Ventures, Inc v Romania* ICSID Case No ARB/01/11, Award of 12 October 2005, at paras 69-80; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 414). See also *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic ('Vivendi II')* ICSID Case No ARB/97/3, Award of 20 August 2007, at para 7.4.44 (actions of an Ombudsman).

2 ARSIWA, Commentary to Article 5, para (1). As to what is to be understood as constituting governmental authority for these purposes see the Commentary to Article 5, para (6).

3 See PARA 346.

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### **346. Ultra vires acts of organs and persons or entities exercising elements of governmental authority.**

A state may incur international responsibility for the act or omission of an organ or a person or entity exercising elements of governmental authority even if the conduct was outside the scope of the actual authority of the organ or official, and even if the act was committed in violation of the state's domestic law<sup>1</sup>. Responsibility may arise within the scope of apparent authority, as for example when it is an act of the type which an official is engaged to perform<sup>2</sup>. It may also arise if the act is beyond the scope of the official's apparent authority but is made possible by means put at his disposal by the state, provided the alien could not have avoided the injury<sup>3</sup>. It is immaterial that the act was done maliciously and with a private motive, or that it was done mistakenly<sup>4</sup>. It may be, however, that exceptionally the state will not incur responsibility if the official's lack of authority to do the act was so blatant that the alien could not in good faith have relied upon it<sup>5</sup>. It appears that all acts of the armed forces of a state during an armed conflict are attributable to it, whether or not they are ultra vires or in contravention of orders<sup>6</sup>.

1 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 7, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2). See also *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*; *Mitchell v Al-Dali* [2006] UKHL 26, [2007] 1 AC 270, [2007] 1 All ER 113 at [12] per Lord Bingham, at [77] per Lord Hoffman, referring to ARSIWA art 7 in support of the conclusion that alleged acts of torture by officials, even if ultra vires, were nevertheless attributable to the state for the purposes of the application of the rules of immunity before the English courts. A state is not, however, responsible for an act of its organ or official while that organ or official is acting on behalf of another state: see PARA 347.

In at least two older cases, responsibility of states for ultra vires acts was denied: see *Tunstall* Foreign Relations of the United States (1885) 450 (shooting by a deputy sheriff); *The 'William Yeaton'* (1885) Moore Int Arb 2944 at 2946, 2947 (obiter). However, the principle of responsibility for ultra vires acts was adopted at the Hague Codification Conference 1930 draft art 8(2) (Acts of the Conference, vol IV, League of Nations Publication 1930, V, 17 at 236-237).

2 *Union Bridge Co* 6 RIAA 138 (1924). See also *Maal Case* 10 RIAA 730 (1903); *Compagnie Générale de Asphaltes de France* 9 RIAA 389 (1903); *Venable* 4 RIAA 219 (1927) (police); *Coquitlam* 6 RIAA 45 (1920); *The Jessie*, *The Thomas F Bayard* and *The Pescawha* 6 RIAA 57 (1921); *The 'Wanderer'* 6 RIAA 68 (1921); *The 'Kate'* 6 RIAA 77 (1921); *The 'Favourite'* 6 RIAA 82 (1921) (customs officials); *Roberts Case* 4 RIAA 77 (1926); *Turner* 4 RIAA 278 (1927); *Knotts* 4 RIAA 537 (1929); *Chazen* 4 RIAA 564 (1930) (illegal arrests and detentions for longer than the prescribed period under the local law). In *Peabody & Co* 4 RIAA 477 (1929), Mexico was held responsible for the imposition of taxes under an invalid law. See also generally *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) ICJ Reports 1986, 14.

3 See eg *Magee* 65 BFSP 875 (1874) (flogging of British vice-consul by local military commander and his troops); *Avalos Tariff* Moore Int Arb 2868 (1868); *Youmans Case* 4 RIAA 110 (1926); *Connelly* 4 RIAA 117 (1926); *Munroe* 4 RIAA 538 (1929) (cases arising out of attacks by mobs on aliens; soldiers who were sent to suppress the riot joined the mob). In the *Mallén Case* 4 RIAA 173 (1927), Mexico was held responsible for one of two attacks, clearly illegal, by a deputy constable against an alien to whom he had shown his badge of office in order to assert his authority (at 176-177). For a personally motivated issue of a void arrest warrant by a judicial authority see *Way* 4 RIAA 391 (1928).

4 For examples of acts done maliciously and from motives of personal revenge see many of the cases cited in the preceding note, especially the *Mallén Case* 4 RIAA 173 at 174-175 (1927); and *Way* 4 RIAA 391 (1928). For an example of acts done by mistake see *Union Bridge Co* 6 RIAA 138 (1924).

5 *Tinoco Arbitration* 1 RIAA 369 at 375, 394 (1923); see also Hague Codification Conference draft art 8(2), proviso.

6 See PARA 341.

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### **347. Conduct of organs placed at the disposal of a state by another state.**

The conduct of an organ placed at the disposal of a state by another state is considered an act of the former state under international law if the organ is acting in the exercise of elements of the governmental authority of the state at whose disposal it is placed<sup>1</sup>. In such circumstances, although remaining an organ of the 'lending' state, the conduct is to be attributable solely to the state at the disposal of which the organ in question has been placed. For these purposes, the organ must be acting with the consent, under the authority of and for the purposes of the receiving state and not only must the organ be appointed to perform functions appertaining to the state at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary state, the organ must also act in conjunction with the machinery of that state and under its exclusive direction and control, rather than on instructions from the sending state<sup>2</sup>.

1 Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 6, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2). See also *Chevreau* 2 RIAA 1113 (1931) (acts of British Consul temporarily placed in charge of a French consulate not attributable to Great Britain); *Drozd and Janousek v France and Spain* A 240 (1992) 14 EHRR 745, ECtHR (conduct of French and Spanish judges sitting as judges of the courts of Andorra not attributable to France and Spain); and *Xhavara v Italy and Albania* (Application 39473/98) (11 January 2001, unreported), ECtHR (international cooperation between Italy and Albania in relation to immigration control not sufficient as such to render acts of an Italian warship attributable to Albania). See also the observations of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 389, and cf para 414). As to the parallel situation in which organs of a state or an international organisation are placed at the disposal of an international organisation, and the question of apportionment of responsibility between them, see PARA 357.

2 See ARSIWA Commentary to Article 6, para (2). See also *R (on the application of Al-Saadoon and Mufhdi) v Secretary of State for Defence* [2008] EWHC 3098 (Admin), [2008] All ER (D) 246 (Dec) at [80] (affd on other grounds [2009] EWCA Civ 7, [2010] 1 All ER 271, [2009] 3 WLR 957) where it was held that ARSIWA art 6 deals with a limited situation in which the organ in question is acting under the exclusive direction and control of the state at the disposal of which it was placed.

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**348. Persons or bodies acting upon instructions or under the direction and control of the state.**

The conduct of a person, group of persons, or entity which does not constitute an organ of a state may nevertheless be attributable to that state if and to the extent that they or it in fact acted upon the instructions or under the direction and control of the state in carrying out the conduct in question<sup>1</sup>. For these purposes, at least in relation to the conduct of armed groups, it is necessary to demonstrate that the particular conduct was in fact directed and controlled by the state<sup>2</sup>. What is relevant is that the state had 'effective control' over the operation in question; for the purposes of state responsibility it is not sufficient that the state merely had 'overall control' of the person, group of persons or entity<sup>3</sup>. Given their separate legal personality, the conduct of state-owned companies or other corporate entities established by the state, whether or not by legislation, will not normally be attributable to the state merely on the basis of partial or total state-ownership<sup>4</sup>. Although in the absence of any evidence of direction or control, the conduct of a state-owned corporation will not in general be attributable to the state, the situation may be different where it can be shown that the state was in fact using its ownership or powers of control over a corporation to achieve a particular result<sup>5</sup> or that a corporation was exercising public powers<sup>6</sup>.

1 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 8, and the Commentary to art 8, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2). See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Reports 1986, 14 at 63-65 (paras 113-116); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (paras 155-160); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (paras 396-412).

2 See ARSIWA art 8, and Commentary to Article 8, paras (4)-(5).

3 As to the requirement of 'effective control' see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Reports 1986, 14 at 64-65 (para 115). In *Prosecutor v Tadić*, Case No IT-94-1-A, 38 ILM 1518 at 1541 (1999) (para 117), the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ('ICTY') had proposed an alternative test of 'overall control' and had disapproved the approach of the International Court of Justice ('ICJ') in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* even though the issue before it was not one of state responsibility but of whether the armed conflict in question was to be characterised as international or non-international. The International Law Commission ('ILC') preferred the approach of the ICJ: see ARSIWA art 8, and Commentary to Article 8, paras (4)-(5). In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007, at paras 398, 401-407 the ICJ endorsed ARSIWA art 8 as representing customary international law and reaffirmed the test of 'effective control' as set out in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* and in the process strongly criticised the decision in *Prosecutor v Tadić*. Direction and control must be established to have existed in respect of each operation in which the alleged violations occurred, and not merely generally in respect of the overall actions taken by the persons or groups of persons having committed the violations: see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* at para 400. For the Court's explanation of the distinction compared to attribution on the basis that a person, group of persons or entity constitutes a de facto organ of the state (as to which see PARA 344) see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* at para 400.



4 See eg *Schering Corp v Islamic Republic of Iran* 5 Iran-US CTR 361 (1984); *Otis Elevator Co v Islamic Republic of Iran* 14 Iran-US CTR 283 (1987); and *Eastman Kodak Co v Government of Iran* 17 Iran-US CTR 153 (1987).

5 Cf *Foremost Tehran Inc v Government of the Islamic Republic of Iran* 10 Iran-US CTR 228 (1986); *American Bell International Inc v Islamic Republic of Iran* 12 Iran-US CTR 170 (1986); *SEDCO Inc v National Iranian Oil Co* 15 Iran-US CTR 23 (1987); *International Technical Products Corp v Government of the Islamic Republic of Iran* 9 Iran-US CTR 206 (1985); and *Flexi-Van Leasing Inc v The Government of the Islamic Republic of Iran* 12 Iran-US CTR 335 (1986). See also *Consorzio Groupement LESI-DIPENTA v People's Democratic Republic of Algeria* ICSID Case No ARB/03/8, Award of 10 January 2005; *LESI, SpA and Astaldi, SpA v People's Democratic Republic of Algeria* ICSID Case No ARB/05/3, Decision of 12 July 2006; and *EnCana Corp v Republic of Ecuador*, LCIA Case No UN3481, Award of 3 February 2006, at para 154.

6 See eg *Phillips Petroleum Co Iran v Islamic Republic of Iran* 21 Iran-US CTR 79 (1989); and *Petrolane Inc v Government of the Islamic Republic of Iran* 27 Iran-US CTR 64 (1991).

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### **349. Revolutions, civil wars and insurrectional or other movements.**

Where an insurrectional movement succeeds in displacing the legitimate government and becomes the new government of a state, the state is responsible retroactively for its acts dating back to their time as insurgents<sup>1</sup>. It will also be responsible for acts of the former legitimate government<sup>2</sup>. Similarly, where an insurrectional or other movement succeeds in establishing a new state in part of the territory of a pre-existing state, the movement's conduct is considered to be an act of the new state<sup>3</sup>. Apart from those specific circumstances, a state does not as such incur international responsibility for the conduct of revolutionaries or insurgents<sup>4</sup>. Responsibility will only be incurred if the legitimate authorities failed to exercise due diligence in the use of the forces at their disposal so as to prevent damage being inflicted by the rebels or insurgents<sup>5</sup>.

1 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 10(1), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2). See also *French Co of Venezuelan Railroads* 10 RIAA 285 (1903); *Kummerow* 10 RIAA 369 (1903); *Dix* 9 RIAA 119 (1903); *Pinson* 5 RIAA 327 (1928).

2 See ARSIWA art 10(3). See also *French Co of Venezuelan Railroads* 10 RIAA 285 (1903).

3 ARSIWA art 10(2).

4 As to the non-attributability of the conduct of private persons see PARAS 353-354.

5 This has been held in many arbitral awards: eg *Sambiaggio* 10 RIAA 499 (1903); *Volkmar* 9 RIAA 317 (1903); *Aroa Mines Ltd* 9 RIAA 402 (1903); *Kummerow* 10 RIAA 369 (1903); *Henriquez* 10 RIAA 713 (1903); *Home (Frontier and Foreign) Missionary Society* 6 RIAA 42 (1920); *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 642, 730 (1925); *Solis* 4 RIAA 358 (1928); *Russell* 4 RIAA 805 (1931). See also *Socony Vacuum Oil Co* (1954) 21 Int LR 55. The principle was acknowledged by the replies of states to the League of Nations Questionnaire for the Hague Codification Conference 1930: see 2 McNair's International Law Opinions 244, 245. A revolution does not as such entitle investors to compensation: *Starrett Housing Corp'n v Islamic Republic of Iran* 4 Iran-US CTR 122 (1983). Iran was held to be not as such responsible for the initial stages of the attacks by militants on US diplomatic and consular premises in Iran and on their occupants, but rather to be in breach of its international obligations to take steps to protect those premises from attack: *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3.

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**350. Conduct carried out in the absence or default of the official authorities.**

Exceptionally, the conduct of a person or group of persons not constituting an organ of the state may be attributed to that state where the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority<sup>1</sup>. The action of private persons in such circumstances is attributable on the basis that they are in fact exercising elements of governmental authority in circumstances in which such an exercise is objectively called for due to the partial or total absence of the properly constituted authorities<sup>2</sup>. Such a situation is to be distinguished from that where there exists a de facto government, the acts of which are to be regarded as constituting acts of an organ of the state<sup>3</sup>.

1 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 9, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2) art 9. See also eg *Yeager v Islamic Republic of Iran* 17 Iran-US CTR 92 at 104 (para 43) (1987) (actions of revolutionary guards in the immediate aftermath of the Iranian revolution).

2 See ARSIWA, Commentary to Article 9, para (6).

3 See *Tinoco Arbitration* 1 RIAA 369 at 381-382 (1923). See PARA 338.

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### **351. Conduct acknowledged and adopted by the state as its own.**

It appears that conduct, including conduct of private persons or individuals, which would not otherwise be attributable to the state may nevertheless be held to be attributable if and to the extent that the state has subsequently acknowledged and adopted the conduct as its own<sup>1</sup>. In this regard, it would appear that a mere expression of approval or endorsement of the actions of private individuals is unlikely to be sufficient in order to justify attribution of that conduct; what is necessary is that the state endorses the conduct and in some sense makes it its own<sup>2</sup>.

1 See Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 11, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); and *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3 at 35 (para 74). See also Case No IT-94-2-PT *Prosecutor v Dragan Nikolić ('Sušica Camp')*, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*, 9 October 2002 (ARSIWA art 11 referred to by way of analogy in relation to the question of whether the acts of private individuals in detaining and delivering an individual to the NATO-led Stabilization Force in Bosnia and Herzegovina (SFOR), which then rendered him to the International Criminal Tribunal for Yugoslavia for trial, were to be attributed to SFOR); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 414) (where the International Court of Justice made passing reference to ARSIWA art 11); and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* ICJ Reports, 4 June 2008 (para 196). As to acts of private individuals see PARA 353.

2 See ARSIWA, Commentary to Article 11, para (6).

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### **352. Non-attributable acts: private acts of officials.**

A state will not as such incur international responsibility for the act of an official if, when the official in question commits that act, he was not exercising any of his official powers or functions and where there is no ostensible relationship between his acts and his official position<sup>1</sup>. However, the state may nevertheless be responsible if it has failed to exercise due diligence to prevent the injury<sup>2</sup>, or if it fails to punish the culprit or otherwise acquiesces in his act<sup>3</sup>. In such circumstances, responsibility arises as a result of the state's own default in failing to act, rather than due to attribution of the act of the official as such.

1 *Bensley* (1850) Moore Int Arb 3016 at 3018; *Putnam Case* 4 RIAA 151 (1927); *Mallén Case* 4 RIAA 173 (1927) (first attack); *Morton* 4 RIAA 428 (1929) (murder by off-duty and drunken army colonel); *Gordon* 4 RIAA 586 (1930).

2 *The 'Zafiro'* 6 RIAA 160 (1925). See also *Jeannaud* (1880) Moore Int Arb 3000.

3 *Montano* (1863) Moore Int Arb 1630.

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### **353. Non-attributable acts: acts of private individuals.**

Acts of private individuals within a state, whether directly committed against a foreign state or its representatives or against the persons or property of individual aliens, do not in themselves engage the responsibility of the territorial state under international law<sup>1</sup>. However, the territorial state may incur liability to the extent that it fails to comply with an obligation incumbent upon it requiring it to exercise due diligence to prevent the injury in question, or to take adequate steps to arrest and punish the offender or to provide redress to the alien or to the foreign state<sup>2</sup>. In such a case the state is responsible for its own actions or omissions in failing to comply with the relevant obligation, and not because of any complicity in the acts of the private individual or individuals in question<sup>3</sup>.

1 *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 (1925); *Kennedy Case* 4 RIAA 194 (1927); *Venable* 4 RIAA 219 (1927).

2 See eg *Noyes* 6 RIAA 308 at 311 (1933); *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 707 (1925); *Ziat* 2 RIAA 729 (1924); *Neer Case* 4 RIAA 60 (1926); *Galvan Case* 4 RIAA 273 (1927); *Sevey Case* 4 RIAA 474 (1929); *Ermerins* 4 RIAA 476 (1929); *Janes Case* 4 RIAA 82 (1926); *Youmans Case* 4 RIAA 110 (1926); *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3. There may also exist a duty of inquiry and explanation: see *Corfu Channel (United Kingdom v Albania)* ICJ Reports 1949, 4 at 18. In relation to the specific rules applicable to the treatment of aliens and their property see PARA 462 et seq.

3 The notion that the state is impliedly an accomplice in the acts of individuals who have injured aliens or foreign states if it fails to prevent the injury or afford redress was adopted in several cases: see eg *Cotesworth and Powell* (1875) Moore Int Arb 2050 at 2083; *Poggioli* 10 RIAA 669 (1903). However, it was subsequently rejected: see, in particular, *Janes Case* 4 RIAA 82 at 87 (1926).

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### **354. Mob violence.**

The principles relating to the acts of a private individual<sup>1</sup> apply whether the private persons act individually or in a group as in the case of mob violence or riot. The state is not an insurer of lives and property<sup>2</sup>. However, it may incur responsibility if its agents acted in connivance with the mob or if it has failed to comply with an obligation of due diligence in preventing the act or punishing the offenders<sup>3</sup>, or where the mob or rioters have been prompted, encouraged or charged to carry out an operation on behalf of the state<sup>4</sup>.

1 See PARA 353.

2 *Home (Frontier and Foreign) Missionary Society* 6 RIAA 42 at 44 (1920); *Walker* 5 RIAA 135 (1931).

3 *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 642 (1925). See also *Youmans Case* 4 RIAA 110 (1926); *Mead Case* 4 RIAA 653 (1930); *Pinson* 5 RIAA 327 (1928); *Noyes* 6 RIAA 308 (1933). See also *Sarropoulos v Bulgarian State* (1927-28) 4 Ann Dig 263 Case No 173. Evidence that the rioters have directed their attacks against persons of a particular nationality may result more readily in a finding of responsibility of the state than in other cases.

4 *The 'Zafiro'* 6 RIAA 160 (1925); *Stephens Case* 4 RIAA 265 (1927); *Lehigh Valley Railroad Co* 8 RIAA 84 (1940). The distinction between persons acting as agents of the state and as its mere supporters was drawn in *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3; see also *Yeager v Islamic Republic of Iran* 17 Iran-US CTR 92 (1987); *Short v Islamic Republic of Iran* 16 Iran-US CTR 76 (1987).

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***B. ATTRIBUTION OF CONDUCT TO INTERNATIONAL ORGANISATIONS***

**355. In general.**

The principal basis of attribution of conduct to an international organisation is that it constitutes the conduct of an organ or agent of the organisation carried out in the performance of the functions of that organ or agent<sup>1</sup>. In addition, an international organisation may incur responsibility as the result of the conduct of organs or agents of another international organisation or of a state which have been placed at its disposal, if and to the extent that it exercises effective control over the conduct in question<sup>2</sup>. Finally, an international organisation may incur responsibility if and to the extent that it acknowledges or adopts particular conduct as its own<sup>3</sup>.

1 See PARA 356.

2 See PARA 357.

3 See PARA 358.



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### **356. Conduct of organs and agents of international organisations.**

The conduct of an organ or agent of an international organisation in the performance of the functions of that organ or agent is attributable to the international organisation whatever position the organ or agent holds in respect of the organisation<sup>1</sup>. The rules of the organisation are applicable to determine the functions of its organs and agents<sup>2</sup>. In relation to the category of 'agents', whether or not an individual has any official status and whether or not he or she is permanently employed is not relevant; what is important is whether the individual has been charged by an organ of the international organisation with carrying out or helping to carry out one of the functions of the organisation<sup>3</sup>. Although the distinction between organs and agents is probably of little relevance given that the key factor is whether or not the actor was carrying out functions on behalf of the international organisation, if a person or entity is characterised as an organ by the internal rules of the organisation, action carried out in that capacity is in principle attributable to the organisation<sup>4</sup>. The acts of an organ or agent are only attributable when the organ or agent is acting in the performance of the functions entrusted to that organ or agent; acts carried out in a private capacity are not attributable<sup>5</sup>.

However, the conduct of an organ or agent of an international organisation acting in that capacity will be attributable even if the conduct exceeds the authority of the organ or agent or exceeds instructions<sup>6</sup>.

1 Draft Articles on Responsibility of International Organizations ('DARIO') draft art 5(1), Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV.

2 DARIO draft art 5(2). By virtue of its rules, an international organisation establishes which functions are entrusted to each organ or agent: see the draft Commentary to draft Article 5, para (8). 'Rules of the organisation' for these purposes means, in particular, the constituent instruments, decisions, resolutions and other acts of the organisation adopted in accordance with those instruments, and established practice of the organisation: draft art 2(b). See further the draft Commentary to draft Article 2, para (14).

3 In other words whether the individual is one of the persons through which the organisation acts: see, in relation to the United Nations, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* ICJ Reports 1949, 174 at 177. See also *Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations* ICJ Reports 1989, 177 at 194 (paras 47, 48) (where the International Court of Justice noted that the UN has increasingly frequently entrusted missions to persons not having the status of UN officials, and that the question of whether such persons enjoy privileges and immunities depends not on their administrative position but upon the nature of their mission); and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* ICJ Reports 1999, 62 at 88-89 (para 66) (noting that although agents of the UN may enjoy immunity from legal process for acts carried out in their official capacity, the corollary is that the UN may be required to bear responsibility for damage caused arising from such acts). It would appear that similar rules apply to other international organisations, although in every case special attention will normally need to be paid to the specific characteristics and functions of the international organisation in question: see DARIO, draft Commentary to draft Article 5, para (4).

4 See DARIO, draft Commentary to draft Article 5, para (5).

5 See DARIO, draft Commentary to draft Article 5, para (6).

6 See DARIO draft art 7. See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts (Advisory Opinion)* ICJ Reports 1996, 66 at 78 (para 25) (where the International Court of Justice observed that, unlike states, international organisations do not possess general competence and that they are governed by the

'principle of speciality', according to which they are invested by the states which create them with powers, the limits of which are a function of the common interests the promotion of which those states entrust to them); *Certain Expenses of the United Nations (Advisory Opinion)* ICJ Reports 1962, 151 at 168; and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* ICJ Reports 1999, 62 at 89 (para 66). As to the UN's responsibility for the off-duty acts of members of peacekeeping forces see DARIO, draft Commentary to draft Article 7, para (9).

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**357. Organs or agents placed at the disposal of an international organisation by a state or another international organisation.**

The conduct of the organ of a state or the organ or agent of an international organisation placed at the disposal of another international organisation may be attributable to that latter organisation if that organisation exercises effective control over the conduct in question<sup>1</sup>.

Where the organ of a state or the organ or agent of one international organisation is placed fully at the disposal of an international organisation on the basis of a full secondment, the general rule of attribution of conduct to international organisations will apply given that the organ or agent will constitute an organ or agent of the international organisation to which it has been seconded<sup>2</sup>. However, situations may arise in which the organ or agent placed at the disposal of the international organisation to some extent remains the organ or agent of the lending state or international organisation<sup>3</sup>. Although questions of division of responsibility may be dealt with by agreement, it will still often be necessary to ascertain to which entity particular conduct of the lent organ or agent is to be attributed. It appears that the determining factor is one of factual control over the specific conduct in question and that in order for conduct to be attributable to the international organisation at the disposal of which the organ or agent has been placed, it is necessary that it should have had effective control over that conduct<sup>4</sup>.

1 See the Draft Articles on Responsibility of International Organizations ('DARIO') draft art 6, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV.

2 DARIO, draft Commentary to draft Article 6 para (1). As to the general basis of attribution to international organisations see PARA 327.

3 This occurs often in the field of United Nations peacekeeping operations for example, given that the contributing state normally retains powers of discipline as well as criminal jurisdiction over the members of the national contingent: see DARIO, draft Commentary to draft Article 6 para (2).

4 DARIO, draft Commentary to draft Article 6 para (3), (6)-(8). Cf the decision of the European Court of Human Rights in *Behrami v France and Saramati v France* (2007) 22 BHRC 477, ECtHR in which reference was made to an earlier draft of DARIO draft art 6, but the Court considered that the relevant factor in assessing whether the actions of troops placed at the disposal of the United Nations or whose actions were authorised by the United Nations could be attributed to the United Nations was whether the Security Council retained ultimate authority and control, rather than where the operational control over the troops reposed. See also *Kasumaj v Greece* Decision on Admissibility of Application 6974/05 (5 July 2007, unreported), ECtHR; *Gajić v Germany* Decision on Admissibility of Application 31446/02 (28 August 2008, unreported), ECtHR; *Berić v Bosnia and Herzegovina*, Decision on Admissibility of Applications 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05 (16 October 2007), ECtHR. The International Law Commission ('ILC') has expressed doubts about the approach of the European Court of Human Rights in those decisions and its application of the ILC's own previous work: see DARIO, draft Commentary to draft Article 6, paras (9)-(10). By contrast, the judgments of the majority in *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, which likewise referred to an early version of DARIO draft art 6, concluded that the actions of British troops present in Iraq pursuant to authorisation by Security Council resolution could not be said to be subject to the effective command and control of the United Nations and the actions of British troops in detaining the applicant were not therefore attributable to the United Nations.

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**358. Conduct acknowledged and adopted by an international organisation as its own.**

As is the position with states<sup>1</sup>, it would appear that conduct which would not otherwise be attributable may be attributed to an international organisation to the extent that it acknowledges and adopts that conduct as its own<sup>2</sup>.

1 As to attribution to states on the basis of acknowledgment and adoption see PARA 351.

2 See the Draft Articles on Responsibility of International Organizations ('DARIO') draft art 8, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. Draft Article 8 is closely modelled upon Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 8, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2): see Commentary to DARIO draft art 8 para (2). See also Case No IT-94-2-PT *Prosecutor v Dragan Nikolić ('Sušica Camp')*, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*, 9 October 2002.

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### (iii) Breach of an International Obligation

#### 359. In general.

For the purposes of state responsibility there is a breach of an international obligation<sup>1</sup> where conduct attributable to the state or international organisation<sup>2</sup> is not in conformity with what is required of it by the international obligation in question<sup>3</sup>. The international obligation in question must be in force and binding for the state or international organisation before it can be breached<sup>4</sup>. The origin of the obligation or its character is irrelevant; breach of an international obligation may occur from conduct inconsistent with an obligation under customary international law, an obligation pursuant to a treaty or an obligation arising from a unilateral act<sup>5</sup>.

1 As to breach of an international obligation as an element of an internationally wrongful act see PARA 336.

2 As to the attribution of conduct see PARA 337 et seq.

3 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 12, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); and the draft Articles on Responsibility of International Organizations ('DARIO') draft art 9(1), Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. See also the various formulations used by the International Court of Justice: eg *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3 at 29 (para 56); *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15 at 50 (para 70); *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 46 (para 57); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 193-194 (para 137); *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 58 (para 115); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (paras 383, 385). In the case of an international organisation, the breach may be of an international obligation arising under the rules of the organisation: DARIO draft art 9(2).

Quite apart from the consequences as a matter of the law of state responsibility, the material breach of a treaty by a state party may provide a basis on which other state parties may either terminate the treaty or suspend its operation in whole or in part: see the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 60; and PARA 107.

4 See ARSIWA art 13; and DARIO draft art 10. This is an application of the principle of the inter-temporal law in accordance with which 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled': see *Island of Palmas Case 2* RIAA 829 at 845 (1928). See also Application 59532/00 *Blečić v Croatia* Judgment of 8 March 2006, ECtHR (Grand Chamber). For the presumption of non-retroactivity of obligations under the law of treaties, see the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 28; and PARA 93.

5 See eg *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 38 (para 47); *Rainbow Warrior (New Zealand/France)* 20 RIAA 215 at 251 (1990). See ARSIWA art 12; and DARIO draft art 9 which make clear that the question of whether or not there is a breach of an international obligation turns solely on whether the conduct in question is in conformity with what is required by the obligation regardless of its origin and character.

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### **360. Extension in time of the breach of an international obligation.**

The breach of an international obligation not having a continuing character<sup>1</sup> occurs at the moment the relevant conduct is performed, even if its effects continue<sup>2</sup>. A breach having a continuing character extends over the whole period in which the conduct in question continues and remains not in conformity with what is required by the international obligation in question<sup>3</sup>. Whether or not an internationally wrongful act is of a continuing nature is relevant to, inter alia, the incidence of the secondary obligation of cessation<sup>4</sup>. It may also be relevant to the jurisdiction *ratione temporis* of international courts and tribunals<sup>5</sup>.

1 As to the important distinction between a breach having a continuing character and those which do not see generally the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') Commentary to Article 14 paras (4), (5), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2). The mere fact that the consequences of an internationally wrongful act extend for some considerable period of time (for instance, the pain and suffering resulting from an act of torture, or the economic effects of an act of expropriation) does not render such breaches of a continuing character: Commentary to Article 14 para (6).

2 ARSIWA art 14(1); draft Articles on Responsibility of International Organizations ('DARIO') draft art 11(1), Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV.

3 ARSIWA art 14(2); DARIO draft art 11(2). The breach of an international obligation requiring a state to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with the obligation: ARSIWA art 14(3); and DARIO draft art 11(3). Nevertheless, certain obligations of prevention are breached instantaneously when the given event occurs and do not result in a continuing breach: see eg ARSIWA Commentary to Article 14 para (14). See also the observations of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 431) in the course of which the court endorsed ARSIWA art 14(3) as representing a general rule of the law of state responsibility.

4 See PARA 381.

5 See eg *Blake v Guatemala (Preliminary Objections)* (1996) Inter-Am Ct HR (Ser C) No 27 at para 40; and *(Merits)* (1998) Inter-Am Ct HR (Ser C) No 36 at para 67 (forced disappearance); *Loizidou v Turkey (Preliminary Objections)* (1995) A 310, ECtHR; and *(Merits)* ECHR Reports 1996-VI (interference with right to property); *Cyprus v Turkey* ECHR Reports 2001-IV (forced disappearance); *Ilascu v Russia and Moldova* ECHR Reports 2004-VII (prolonged deprivation of liberty).

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### **361. Composite internationally wrongful acts.**

The breach of some international obligations may occur only through the combination of a series of acts or omissions which, taken singly, do not breach the obligation in question, but in the aggregate, are internationally wrongful<sup>1</sup>. In such cases a breach occurs upon the occurrence of the particular action or omission which, taken with the other actions or omissions, is sufficient to constitute the internationally wrongful act<sup>2</sup>. A breach consisting of such a composite act is of a continuing character<sup>3</sup> and extends over the entire period starting with the first of the actions or omissions in the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation in question<sup>4</sup>.

1 Examples include the prohibitions of genocide, apartheid and crimes against humanity, the prohibition of systematic acts of racial discrimination, and systematic acts of discrimination prohibited by a trade agreement: Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') Commentary to Article 15, para (2), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2).

2 See the ARSIWA art 15(1); and the draft Articles on Responsibility of International Organizations ('DARIO') draft art 12(1), Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV.

3 As to breaches of a continuing character see PARA 360.

4 ARSIWA art 15(2); DARIO draft art 12(2).

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#### **(iv) Circumstances Precluding Wrongfulness**

##### **362. Circumstances precluding wrongfulness.**

The modern law of international responsibility recognises a category of defences or justifications called 'circumstances precluding wrongfulness'<sup>1</sup> which are separate from and parallel to the rules of the law of treaties which govern the termination and suspension of treaties or obligations arising under treaties<sup>2</sup>. Where a situation constituting a circumstance precluding wrongfulness is established, it precludes the wrongfulness of conduct only for so long as the situation in question persists and is without prejudice to the resumption of the performance of the obligation or obligations in question if and to the extent that the circumstance precluding wrongfulness in question no longer exists<sup>3</sup>. Despite the successful invocation of a circumstance precluding wrongfulness in some circumstances the state or international organisation to which the act in question is attributable may nevertheless be required to pay compensation to those injured<sup>4</sup>. The generally recognised circumstances in which the wrongfulness of an act may be precluded are:

- 92 (1) where the other state has validly consented to the commission of the act in question<sup>5</sup>;
- 93 (2) where the act constitutes a lawful measure of self-defence<sup>6</sup>;
- 94 (3) where the act in question constitutes a valid countermeasure<sup>7</sup>;
- 95 (4) where the act in question occurs as the result of force majeure<sup>8</sup>;
- 96 (5) where the author of the act in question was in a situation of distress and had no other means of saving his life or the lives of persons entrusted to his care<sup>9</sup>; and
- 97 (6) where there exists a state of necessity<sup>10</sup>.

A general limitation on the invocation of circumstances precluding wrongfulness as a defence to an internationally wrongful act is that they have no effect to the extent that the conduct in question involves a breach of an obligation deriving from a peremptory norm of general international law (*jus cogens*)<sup>11</sup>. Nevertheless, valid consent may constitute a good defence in relation to, inter alia, an allegation that a state has breached the prohibition of the use of force<sup>12</sup>.

1 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA'), Pt 1, Ch V, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); and the draft Articles on Responsibility of International Organizations ('DARIO') Pt 1, Ch V, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. The question of whether the successful invocation of a circumstance precluding wrongfulness precludes the internationally wrongful character of the act itself, or whether it merely has the effect of precluding the responsibility of the invoking state in relation to an act which is nevertheless internationally wrongful remains unresolved, although the International Law Commission ('ILC') has taken the view that the former is correct: see further *CMS Gas Transmission Co v Argentine Republic* ICSID Case No ARB/01/8, Decision on Annulment of 25 September 2007, at paras 132-134.

2 See eg *Rainbow Warrior (New Zealand/France)* 20 RIAA 215 at 251-252 (1990); *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 38-39 (paras 47-48).

3 See ARSIWA art 27(a); DARIO art 26(a). See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 63 (para 101).



4 See ARSIWA art 27(b); DARIO art 26(b). See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 39 (para 48) (not disputed that establishment of the existence of a state of necessity would not have precluded an obligation to pay compensation). Whether or not compensation is due depends on the primary obligation in question: see ARSIWA Commentary to Article 27, paras (4)-(6). There was consideration of the question of whether compensation is payable as a matter of customary international law in circumstances in which reliance is placed on a circumstance precluding wrongfulness in some of the cases concerning Argentina's assertions of the existence of a state of necessity arising out of the Argentine financial crisis: see eg *CMS Gas Transmission Co v Argentine Republic* ICSID Case No ARB/01/8, Award of 12 May 2005; and Decision on Annulment of 25 September 2007; *LG&E Energy Corpn, LG & E Capital Corpn, and LG & E International Inc v Argentine Republic* ICSID Case No ARB/02/1, Decision on Liability of 3 October 2006; *Enron Creditors Recovery Corpn (formerly Enron Corpn) and Ponderosa Assets LP v Argentine Republic* ICSID Case No ARB/01/3, Award of 22 May 2007; *Sempra Energy International v Argentine Republic* ICSID Case No ARB/02/16, Award of 28 September 2007; *BG Group plc v Republic of Argentina* Final Award of 24 December 2007, UNCITRAL; *Continental Casualty Co v Argentine Republic* ICSID Case No ARB/03/9, Award of 5 September 2008; *National Grid plc v Republic of Argentina* Award of 3 November 2008, UNCITRAL.

5 As to consent see PARA 363.

6 As to self-defence see PARA 364.

7 As to countermeasures see PARA 365.

8 As to force majeure see PARA 366.

9 As to distress see PARA 367.

10 As to necessity see PARA 368.

11 See ARSIWA art 26; DARIO draft art 25. As a consequence, a state may not validly consent to, for instance, a violation of the jus cogens prohibitions of genocide or of torture: see ARSIWA Commentary to Article 26, para (6). As to the concept of jus cogens see PARA 11.

12 See ARSIWA Commentary to Article 26, para (6). Further to the extent that the military forces of a state are present on the territory of another pursuant to consent validly granted by the latter state, there is no internationally wrongful act: see eg *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* ICJ Reports, 19 December 2005. See further PARA 363.

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### **363. Consent.**

The wrongfulness of conduct which would otherwise constitute a breach of international obligations owed to a state or international organisation is precluded to the extent that that state or international organisation has given its valid consent to the conduct in question<sup>1</sup>. Consent will normally need to be clearly expressed and is not to be presumed<sup>2</sup>. The wrongfulness of an act will be precluded only to the extent that it is within the limits of any consent validly given<sup>3</sup>. In relation to an ongoing situation, for instance where consent has been given by a state to the presence and activities of troops of another state on its territory, the consent may be withdrawn so long as the fact of the withdrawal is communicated in a sufficiently unambiguous fashion<sup>4</sup>. Consent as a circumstance precluding wrongfulness operates only bilaterally, such that to the extent that a particular obligation is owed to more than one state or international organisation, consent by one of the actors to which the obligation is owed does not preclude wrongfulness as against the others<sup>5</sup>.

1 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 20, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); and the draft Articles on Responsibility of International Organizations ('DARIO') draft art 19, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. For consent to be valid it must have been given by a person having the appropriate authority to do so and must not be affected by coercion or other vitiating factors: see generally ARSIWA Commentary to Article 20, paras (4)-(6). In relation to certain situations international law lays down specific primary rules as to who is able to provide consent: see eg the Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) 1961 art 22(1). Whether or not a person has sufficient authority to provide consent may depend on the act in question: see eg *Savarkar* 11 RIAA 243 at 253-255 (1911) (the arrest of an individual by British agents on French territory did not violate France's sovereignty as implicit consent had been given to the actions of the British agents as a result of assistance in the capture provided by a French gendarme). Wrongfulness may not in general be precluded when the breached obligation arises under a peremptory norm: see PARA 362.

2 See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (paras 101, 104); and ARSIWA Commentary to Article 20, para (6).

3 See eg ARSIWA Commentary to Article 20, paras (1), (9); and see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (para 52).

4 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (para 106).

5 See eg *Customs Régime between Germany and Austria* PCIJ Ser A/B No 41 at 37, 46, 49 (1931); ARSIWA Commentary to Article 20, para (9).

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### 364. Self-defence.

The wrongfulness of an act which would otherwise be inconsistent with the international obligations of a state or international organisation is precluded to the extent the act in question constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations<sup>1</sup>. The categories of obligations in relation to which wrongfulness may be precluded are not limited to the prohibition of the use of force. Nevertheless, the wrongfulness of the breach of certain obligations which either are expressly envisaged as applying to armed conflict or which are expressed to be absolute in all circumstances may not be precluded on the basis that the action in question was taken by way of self-defence<sup>2</sup>.

1 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 21, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); and draft Articles on Responsibility of International Organizations ('DARIO') draft art 20, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV (although draft art 20 contains no reference to the Charter of the United Nations, and refers instead to self-defence under international law). See also *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ICJ Reports 1996, 226 at 244, 263 (paras 38, 96); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 194 (paras 138-139); *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* ICJ Reports, 19 December 2005. Cf *Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Reports 2003, 161 (the question of whether action could be said to fall within an exception to the substantive obligations under a bilateral treaty in relation to situations involving the 'essential security interests' of the states involved was to be determined in the light of the law relating to the use of force, including the rules relating to self-defence, under the Charter and customary international law).

2 For instance, the rules of international humanitarian law, in particular those contained in the four 1949 Geneva Conventions and Additional Protocol I, adopted in 1977 (as to which see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 421): see eg *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ICJ Reports 1996, 226 at 242, 257 (paras 30, 79) where the International Court of Justice referred to the fundamental rules of international humanitarian law as constituting 'intransgressible principles of international customary law'; and to obligations of 'total restraint' as regards rules of environmental law. A number of international human rights treaties enumerate obligations which are non-derogable under any circumstances, including in time of armed conflict: as to the relationship between international humanitarian law and international human rights law in this regard see *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ICJ Reports 1996, 226 at 240 (para 25); and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 177-178 (paras 105-106).

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### **365. Countermeasures.**

The wrongfulness of an act of a state or an international organisation which is not in conformity with what is required of it by an international obligation is precluded if and to the extent that it constitutes a lawful countermeasure<sup>1</sup>. The adoption of countermeasures is to be distinguished from the termination or suspension of a treaty by reason of a material breach thereof<sup>2</sup>. The adoption of countermeasures is subject to stringent conditions: countermeasures may only be adopted against a state or international organisation which is responsible for an internationally wrongful act in order to induce it to comply with the secondary obligations which arise as the result of the commission of an internationally wrongful act<sup>3</sup>. Countermeasures are limited to the non-performance for the time being of international obligations owed towards the responsible state or international organisation<sup>4</sup> and must, so far as possible, be adopted in such a way as to permit the resumption of performance of the obligation in question<sup>5</sup>. Countermeasures must be terminated as soon as the responsible state has complied with the secondary obligations arising from its internationally wrongful act<sup>6</sup>.

Certain obligations may not be affected by way of countermeasures; this is the case with the prohibition of the threat or use of force, obligations for the protection of fundamental human rights, obligations of a humanitarian character prohibiting reprisals and other obligations arising under peremptory norms of general international law<sup>7</sup>. Similarly, even when adopting countermeasures, a state or international organisation is not relieved from complying with any applicable obligations relating to the peaceful settlement of disputes which apply in the relations between it and the responsible state or international organisation<sup>8</sup>. A state taking countermeasures is not relieved from its obligations relating to the inviolability of diplomatic or consular agents, premises, archives or documents<sup>9</sup>.

The countermeasures open to a state in reaction to a breach of its international obligations are not unlimited, and any countermeasures adopted must be proportionate, in the sense that the measure adopted must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question<sup>10</sup>.

The adoption of a valid countermeasure is subject to various procedural conditions: prior to adopting countermeasures, it is normally necessary to first call upon the responsible state or international organisation to fulfil the secondary obligations of cessation and reparation which arise as a result of the commission of an internationally wrongful act<sup>11</sup>. In addition, it appears that there is a requirement that notification of the decision to adopt countermeasures must be given, and an offer to negotiate prior to the actual adoption of the countermeasures be made<sup>12</sup>. It has also been proposed that, given that the underlying purpose of countermeasures is to ensure compliance with the secondary obligations of international responsibility, they may not be taken, or if taken must be suspended immediately, if the underlying internationally wrongful act has ceased and the dispute is pending before a court or tribunal which has the power to take decisions binding on the parties<sup>13</sup>.

If a measure consisting of suspension of performance of an obligation constitutes a valid countermeasure, wrongfulness is only precluded as against the target which committed the prior internationally wrongful act and not as against any other entity to which an obligation affected by the countermeasure is owed<sup>14</sup>.

1 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') arts 22, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); and the draft Articles on Responsibility of International Organizations ('DARIO') draft art 21, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. The extent to which a state which is not directly injured or affected by a breach of an international obligation may take countermeasures is a question of some controversy and it is not clear to what extent such states may legitimately adopt measures otherwise inconsistent with their international obligations in order to ensure compliance with the secondary obligations of cessation and reparation. For the International Law Commission's ('ILC') position see ARSIWA art 54; DARIO draft art 56. Wrongfulness may not be precluded when the breached obligation arises under a peremptory norm: see PARA 368.

2 As to which see the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 60; and PARA 107.

3 ARSIWA art 49(1); DARIO draft art 50(1). As to the secondary obligations which constitute the content of international responsibility see PARA 373 et seq.

4 ARSIWA art 49(2); DARIO draft art 50(2).

5 ARSIWA art 49(3); DARIO draft art 50(3).

6 See ARSIWA art 53; DARIO draft art 55.

7 ARSIWA art 50(1)(a)-(d); DARIO draft art 52(1)(a)-(d). In relation to countermeasures against international organisations, the ILC has proposed that the member states of an international organisation may not take countermeasures against that organisation unless the adoption of the countermeasures are not inconsistent with the rules of the organisation and no available means are otherwise available for inducing compliance with the secondary obligations of the international organisation: see DARIO draft art 51.

8 ARSIWA art 50(2)(a); see also DARIO draft art 52(2)(a). See also *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3 at 28 (para 53).

9 See ARSIWA art 50(2)(b). See also *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3 at 38, 40 (paras 83, 86) (the possible remedies for dealing with illicit activities of members of diplomatic and consular missions are expressly laid down in diplomatic law such that that body of law constitutes a self-contained regime and the adoption of countermeasures consisting of the suspension of the rules relating to inviolability of diplomatic and consular representatives is never permissible). As to diplomatic and consular privileges and immunities see PARA 265 et seq. The ILC has suggested that a similar limitation upon countermeasures exists in relation to obligations relating to inviolability of agents of a responsible international organisation and the premises, archives and documents of the organisation: DARIO draft art 52(2)(b).

10 See ARSIWA art 51; DARIO draft art 53. See also *Air Services Agreement (USA v France)* 18 RIAA 417 (1978); and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 56 (paras 85, 87)

11 See ARSIWA art 52(1)(a); DARIO draft art 54(1)(a). See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 56 (para 84). As to the content of international responsibility see PARA 373 et seq.

12 See ARSIWA art 52(1)(b); DARIO draft art 54(1)(b). See also *Air Services Agreement (USA v France)* (1978) 18 RIAA 417 at 444 (paras 85-87). Notwithstanding this restriction, the injured state or international organisation may take such urgent countermeasures as are necessary to preserve its rights: ARSIWA art 52(2); DARIO draft art 54(2).

13 See ARSIWA art 52(3). The requirement does not apply to the extent that the responsible entity fails to implement the dispute resolution procedures in good faith: art 52(4). As to the proposed position in relation to countermeasures against international organisations see DARIO draft Article 54(3), (4).

14 See ARSIWA Commentary to Article 22, paras (4), (5). In the specific field of investment protection, there exist conflicting decisions as to whether the adoption of a countermeasure by a host state in reaction to a prior breach of its international obligations by the state of nationality of an investor is in principle capable of precluding the wrongfulness of that measure as against the investor to the extent that it is inconsistent with the substantive obligations of protection owed by the host state to the investor: see *Archer Daniels Midland Co and Tate & Lyle Ingredients Americas, Inc v United Mexican States* ICSID Case No ARB(AF)/04/5, Award of 21 November 2007; and *Corn Products International, Inc v United Mexican States* ICSID Case No ARB(AF)/04/1, Decision on Liability of 15 January 2008 (both of which relate to claims brought by investors under NAFTA).

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### 366. Force majeure.

The wrongfulness of what would otherwise constitute an internationally wrongful act because it was not in conformity with what is required by an international obligation may be precluded to the extent that the inability to comply with the international obligation in question was the result of force majeure, that is to say, as the result of the occurrence of an irresistible force or of an unforeseen event, beyond the control of the state or international organisation, making it materially impossible in the circumstances to perform the obligation in question<sup>1</sup>. The occurrence in question must make performance impossible: it is not sufficient that it merely made performance of the obligation in question more difficult or onerous<sup>2</sup>.

Force majeure is to be distinguished from situations of distress by the involuntary nature, or lack of free choice, in the conduct inconsistent with an international obligation<sup>3</sup>. Force majeure may not be relied upon to preclude the wrongfulness of an act if the occurrence constituting force majeure is due, either alone or in combination with other factors, to the conduct of the state or international organisation invoking it<sup>4</sup>, nor if there has been an assumption of the risk of the event in question occurring by the state seeking to rely upon it<sup>5</sup>.

1 Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 23, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); draft Articles on Responsibility of International Organizations ('DARIO') draft art 22, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. As to the extent to which force majeure may permit termination of a treaty see the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 61; and PARA 108. As to force majeure in relation to ships involved in innocent passage see the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 18; and PARA 133. The existence of the principle of force majeure has been recognised by the Permanent Court of International Justice: see eg *Serbian Loans* PCIJ Ser A No 20, 39-40 (1929); and *Brazilian Loans* PCIJ Ser A No 21, 120 (1929) (although no force majeure was found on the facts). See also *Russian Indemnity Case* 11 RIAA 421 at 443 (1912); and *Lighthouses* 12 RIAA 155, at 219-220 (1956) (the restitution of lighthouses which had been requisitioned was denied on the basis that they had been destroyed by enemy action); and *Rainbow Warrior (New Zealand/France)* 20 RIAA 215 (1990). For recognition of force majeure as a matter of European Community law see Case 145/85 *Denkavit Belgie NV v Belgium* [1987] ECR 565, [1988] 2 CMLR 679, ECJ. As to force majeure as a matter of English law see **CONTRACT** vol 9(1) (Reissue) PARA 906.

2 *Rainbow Warrior (New Zealand/France)* 20 RIAA 215 at 252-253 (1990). Accordingly, the category of force majeure does not encompass situations of political or economic crisis if their effects are only to make performance more difficult: see ARSIWA Commentary to Article 23, para (3); and *Enron Creditors Recovery Corp'n (formerly Enron Corp'n) and Ponderosa Assets, LP v Argentine Republic* ICSID Case No ARB/01/3, Award of 22 May 2007, at para 217; *Sempra Energy International v Argentine Republic* ICSID Case No ARB/02/16, Award of 28 September 2007, at para 246; cf however, *Autopista Concesionada de Venezuela CA v Bolivarian Republic of Venezuela* ICSID Case No ARB/00/5, Award of 23 September 2003, at paras 120-125.

3 ARSIWA Commentary to Article 23, para (1). As to distress see PARA 367.

4 ARSIWA art 23(2)(a); DARIO draft art 22(2)(a). See also *Libyan Arab Foreign Investment Co v Republic of Burundi* (1994) 96 ILR 279 at 318 (para 55); *Gould Marketing, Inc v Ministry of National Defense of Iran* 3 Iran-US CTR 147 at 153 (1983); cf *Autopista Concesionada de Venezuela CA v Bolivarian Republic of Venezuela* ICSID Case No ARB/00/5, Award of 23 September 2003, at para 128.

5 ARSIWA art 23(2)(b); DARIO draft art 22(2)(b).

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### **367. Distress.**

The wrongfulness of conduct which is not in conformity with the international obligations of a state or international organisation is precluded to the extent that the author of the act in question had no other reasonable way, in a situation of distress, of saving either his own life or the lives of others entrusted to his care<sup>1</sup>. In contrast to a situation of force majeure, the individual author of the conduct which is attributable to the state or international organisation in question and is inconsistent with its obligations has some freedom of choice and is not acting involuntarily, even if the choices available are effectively limited<sup>2</sup>. Distress is most often invoked in relation to ships and aircraft which violate maritime boundaries, although it is not so limited<sup>3</sup>.

Distress may not be relied upon where the situation is one which is due, either alone or in combination with other factors, to the conduct of the state or international organisation which seeks to invoke it<sup>4</sup>. Further, distress may not be relied upon to the extent that the act in question is likely to create a comparable or greater peril than that which it is sought to avoid<sup>5</sup>.

1 Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 24, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); draft Articles on Responsibility of International Organizations ('DARIO') draft art 23, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. For an example of embodiment of the principle in a treaty relating to the law of the sea, see United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmd 4524) arts 18 para 2, 39 para 1(c), 98 and 109 para 2 (see PARAS 133, 146, 150, 196).

2 See ARSIWA, Commentary to Article 24 para (1). As to force majeure see PARA 366.

3 See eg *Rainbow Warrior (New Zealand/France)* 20 RIAA 215 (1990) (distress was invoked on the basis of medical emergencies and was held in the particular circumstances partially to preclude the wrongfulness of the act).

4 ARSIWA art 24(2)(b); DARIO draft art 23(2)(b).

5 ARSIWA art 24(2)(a); DARIO draft art 23(2)(a).

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### 368. Necessity.

The wrongfulness of conduct that would otherwise constitute a breach by a state or international organisation of one or more of its international obligations may be precluded to the extent that the state or international organisation can establish that the conduct in question was taken in response to a state of necessity<sup>1</sup>.

A state may not invoke a state of necessity unless the act in question is the only way<sup>2</sup> for it to safeguard an essential interest<sup>3</sup> against a grave and imminent peril<sup>4</sup>. An international organisation may not invoke a state of necessity unless the act in question is the only way for the organisation to safeguard against a grave and imminent peril an essential interest of the international community as a whole when the organisation has, in accordance with international law, the function to protect that interest<sup>5</sup>. Neither a state nor an international organisation may invoke a state of necessity unless the act in question does not seriously impair an essential interest of the state or states to which the obligation is owed, or of the international community as a whole<sup>6</sup>. Further, necessity may not be invoked where the primary international obligation in question excludes the possibility of invoking necessity<sup>7</sup>, nor where the state or international organisation invoking necessity has contributed to the situation<sup>8</sup>. The defence of necessity is exceptional such that the conditions noted above must be cumulatively satisfied, and the state or international organisation involved is not the sole judge of whether the conditions in question are fulfilled<sup>9</sup>.

The extent to which the results of a financial crisis may be relied upon as giving rise to a state of necessity such as to preclude the wrongfulness of acts adopted to combat the crisis is not entirely clear<sup>10</sup>.

1 The International Court of Justice has stated that the existence of a state of necessity is recognised by customary international law as a ground for precluding the wrongfulness of an act not in conformity with an international obligation: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 40 (para 51); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 194-195 (para 140). See also *R (Corner House Research and Campaign Against Arms Trade) v Director of the Serious Fraud Office* [2008] EWHC 714 (Admin), [2009] 1 AC 756 (revsd on other grounds [2008] UKHL 60; [2009] 1 AC 756).

2 See eg *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 195 (para 140). See also the cases on the Argentine financial crisis in note 10.

3 A state's essential interests do not solely concern matters implicating its very existence, and an essential interest may be constituted by concerns in relation to the natural environment: see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 41 (para 53).

4 Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 25(1)(a), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2). As to the requirement that the peril be grave and imminent, the mere apprehension of a possible peril is insufficient, and the requirement of imminence is synonymous with immediacy or proximity and goes far beyond the concept of 'possibility'; however, that does not exclude the possibility that a peril appearing in the long term might be held to be 'imminent' as soon as it is established that its realization, however far off in the future it might be, is certain and inevitable: see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 42 (para 54).

5 Draft Articles on Responsibility of International Organizations ('DARIO') draft art 24(1)(a), Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV.

6 ARSIWA art 25(1)(b); DARIO draft art 24(1)(b).



7 ARSIWA art 25(2)(a); DARIO draft art 24(2)(a). The International Court of Justice has raised, but not answered, the question: see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 194-195 (para 140).

8 ARSIWA art 25(2)(b); DARIO draft art 24(2)(b). See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 45-46 (para 57).

9 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 40 (para 51).

10 See the various decisions arising out of the Argentine financial crisis (although the reasoning as to the customary international law defence of necessity in a number of those decisions is obscured by considerations relating to the operation of provisions contained in the applicable bilateral investment treaties which dealt with situations of emergency or exceptions to their application based on considerations of security): *CMS Gas Transmission Co v Argentine Republic* ICSID Case No ARB/01/8, Award of 12 May 2005; and Decision on Annulment of 25 September 2007; *LG & E Energy Corp., LG & E Capital Corp., and LG & E International Inc v Argentine Republic* ICSID Case No ARB/02/1, Decision on Liability of 3 October 2006; *Enron Creditors Recovery Corp. (formerly Enron Corp.) and Ponderosa Assets LP v Argentine Republic* ICSID Case No ARB/01/3, Award of 22 May 2007; *Sempra Energy International v Argentine Republic* ICSID Case No ARB/02/16, Award of 28 September 2007; *BG Group plc v Republic of Argentina* Final Award of 24 December 2007, UNCITRAL; *Continental Casualty Co v Argentine Republic* ICSID Case No ARB/03/9, Award of 5 September 2008; *National Grid plc v Republic of Argentina* Award of 3 November 2008, UNCITRAL. One Tribunal queried, without expressing any view, whether the customary international law state of necessity could be invoked in order to preclude the wrongfulness of acts taken against an investor, rather than against another state: *BG Group plc v Republic of Argentina*, at para 408.

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## **(v) Ancillary Responsibility in connection with the Act of another State or International Organisation**

### **369. In general.**

Quite apart from the direct breach of its own obligations, a state or international organisation may incur responsibility as the result of its actions in connection with the internationally wrongful act of another state or international organisation<sup>1</sup>. Responsibility may arise due to the fact that the state or international organisation provides aid or assistance in relation to a breach by another state or international organisation of its own international obligations, because it directs and controls another state or international organisation in the breach of its international obligations<sup>2</sup>, or because it exerts coercion over another state or international organisation so as to force it to breach its own international obligations<sup>3</sup>. In addition, it has been suggested that, in certain specific circumstances, the member states of an international organisation may incur responsibility as the result of conduct of the international organisation<sup>4</sup>.

1 See PARA 370.

2 See PARA 371.

3 See PARA 372.

4 For the International Law Commission's proposals in this regard, see the draft Articles on Responsibility of International Organizations ('DARIO') draft arts 17, 60, 61, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. Where a member state of an international organisation attempts to avoid compliance with its own international obligations by taking advantage of the fact that the international organisation has competence in relation to the subject matter of that obligation it is proposed that it should be irrelevant whether the conduct in question is internationally wrongful for the international organisation: see draft art 60. The rule proposed in draft art 61 deals with situations in which a member state is to be regarded as responsible for an internationally wrongful act of the international organisation of which it is a member on the basis that either it has accepted responsibility for the act in question, or it has led the injured party to rely on its responsibility it is proposed that the responsibility of the member state should be presumed to be subsidiary to that of the international organisation: draft art 61. It is also proposed that the responsibility of an international organisation which is a member of another international organisation should arise under similar conditions as for member states under draft arts 60 and 61: draft art 17.

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### **370. Aid and assistance in the breach by a state or international organisation of its international obligations.**

A state which aids or assists another state in the breach of an international obligation may thereby incur its own responsibility<sup>1</sup>. A state which provides aid or assistance is responsible for its own internationally wrongful act, consisting in the provision of the aid and assistance which assists the other state to breach its international obligation; it is not responsible, as such, for the act of the assisted state<sup>2</sup>.

It is necessary that the state providing the aid or assistance should have knowledge of the circumstances giving rise to the breach of its international obligations by the aided or assisted state<sup>3</sup>. Further, the aid or assistance must be provided with a view to facilitating the commission of the internationally wrongful act by the other state, and must in fact do so, although it appears that there is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act and it will be sufficient if the aid or assistance contributed significantly to the internationally wrongful act of the other state<sup>4</sup>. Finally, it appears that, in order for the responsibility of the state providing aid or assistance to arise, it is necessary that the internationally wrongful act in relation to which aid or assistance is provided must be such that it would have been wrongful if committed by the state providing the aid or assistance<sup>5</sup>.

It seems that analogous rules apply in relation to the situation in which a state aids or assists an international organisation in breaching its international obligations<sup>6</sup>, as well as to that in which an international organisation aids or assists another international organisation or a state in breaching its international obligations<sup>7</sup>.

1 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 16, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2). The International Court of Justice has affirmed that that provision represents customary international law: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 420) (the court observed that the notion of 'complicity in genocide' was not different in substance from that aid or assistance provided by a state in relation to the internationally wrongful act of another state under ARSIWA art 16).

2 See ARSIWA Commentary to Article 16, para (10).

3 See ARSIWA art 16(a); and Commentary to Article 16, para (4). See also the approach of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (paras 421, 432).

4 See ARSIWA, Commentary to Article 16, para (5).

5 See ARSIWA art 16(b); and Commentary to Article 16, para (6). In the field of treaty obligations, that requirement would appear to follow from the principle of the relative effect of treaties: see the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) arts 34, 35; and PARA 99.

6 Draft Articles on Responsibility of International Organizations ('DARIO') draft art 57, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV.

7 DARIO draft art 13.



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### **371. Direction and control over the breach by a state or international organisation of its international obligations.**

A state may incur international responsibility to the extent that it exercises direction or control over another state in the commission of an internationally wrongful act by that latter state<sup>1</sup>. In such circumstances each of the states involved incurs its own responsibility<sup>2</sup>.

Historically, situations in which one state had power to direct and control another state in the commission of an internationally wrongful act arose principally in the context of relations of dependency such as suzerainty or a protectorate<sup>3</sup>. In modern practice, such situations have arisen in particular in the context of belligerent occupation<sup>4</sup>, although it is possible that one state may have the power to direct and control the conduct of another in a specific sector by virtue of treaty<sup>5</sup>.

The dominant state must actually direct and control<sup>6</sup> the conduct of the dependent state which breaches its international obligations, it is not sufficient that the dominant state may merely have the power to exercise direction and control over another state in some field, or that it may have the power to interfere in matters of administration internal to a dependent state, if it did not in fact do so<sup>7</sup>. It appears that it is also necessary that the dominant state should direct and control the commission of the wrongful act with knowledge of the circumstances, and that the internationally wrongful act of the dependent state must be such that it would be internationally wrongful if committed by the dominant state<sup>8</sup>.

Rules analogous to those noted above appear to apply to situations in which a state directs or controls an international organisation in breaching its international obligations<sup>9</sup>, and where an international organisation directs or controls either another international organisation or a state in breaching its international obligations<sup>10</sup>.

1 See Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 17, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2). See also *Robert E Brown Case* 6 RIAA 120 (1923); and *Heirs of the Duc de Guise* 13 RIAA 150 (1953).

2 Exceptionally the dependent state may be able to rely on a circumstance precluding wrongfulness, for instance, force majeure: see ARSIWA, Commentary to Article 17, para (9). As to force majeure see PARA 366.

3 See eg *Robert E Brown Case* 6 RIAA 120 (1923); *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 (1925); *Rights of Nationals of the United States of America in Morocco (France v United States of America)* ICJ Reports 1952, 176; and see also ARSIWA, Commentary to Article 17, paras (2), (3). To the extent that a dependent territory or the constituent units of a federal state do not have separate legal personality and are not considered to be states under international law, their situation falls to be governed by the normal rules of state responsibility, such that their conduct is to be attributed to the state upon which they are dependent or of which they form part: see ARSIWA, Commentary to Article 17, para (4). As to the attribution of the acts of constituent entities of a federal state see PARA 339.

4 See eg *Heirs of the Duc de Guise* 13 RIAA 150 (1953).

5 See ARSIWA, Commentary to Article 17, para (5).

6 'Direct' requires more than mere incitement or suggestion, rather there must be actual direction of an operative kind; 'control' refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less of influence or concern: ARSIWA, Commentary to Article 17, para (7).

7 See ARSIWA, Commentary to Article 17, para (6); and *Heirs of the Duc de Guise* 13 RIAA 150 at 161 (1953) (where it was held despite the fact of Allied occupation and administrative control of Sicily at the relevant time, Italy could not avoid international responsibility arising from the requisition of the property of a foreign national since there had been no interference by the commander of the Allied Forces or of any of the Allied Authorities which had resulted in the relevant decrees issued by the Region of Sicily); and *Robert E Brown Case* 6 RIAA 120 at 130,131 (1923) (where it was held that the suzerainty exercised by Great Britain over the South African Republic was not sufficient to make it responsible for all acts of the legislature, executive and judiciary of the South African Republic, and that Great Britain had not in fact interfered in the internal administration of the South African Republic).

8 ARSIWA art 17(a), (b).

9 Draft Articles on Responsibility of International Organizations ('DARIO') draft art 58, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV.

10 DARIO draft art 14. It is also proposed that an international organisation should incur responsibility where it adopts a decision binding a member state or another international organisation to commit an act that would be internationally wrongful if committed by the international organisation adopting the decision and which would circumvent its international obligations, or where it authorises or recommends a member state or international organisation to take such action and such action is in fact taken as a result of the authorisation or recommendation: see draft art 16(1). In this regard, it is suggested that it is irrelevant whether or not the act in question is internationally wrongful for the member state or international organisation which actually commits the act: see draft art 16(3).

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**372. Coercion resulting in the breach by a state or international organisation of its international obligations.**

A state which coerces another state to commit an internationally wrongful act will incur international responsibility for the act if, but for the coercion, the act in question would have been an internationally wrongful act of the coerced state and the coercing state applies the coercion with knowledge of the circumstances of the act<sup>1</sup>. It appears that the coercion will normally have to amount to force majeure for the coerced state, such that its will is forced, giving it no effective choice other than to comply with the wishes of the coercing state<sup>2</sup>. In this regard, it is not sufficient that compliance with the obligation in question is made more difficult or onerous, or that assistance or direction is provided<sup>3</sup>. Coercion for these purposes is not limited to unlawful coercion, but may extend to serious economic pressure<sup>4</sup>. Given the equation of coercion with force majeure, the coerced state will often be able to successfully invoke a circumstance precluding wrongfulness in order to avoid its own responsibility<sup>5</sup>.

Rules analogous to those noted above appear to apply to situations in which an international organisation coerces a state or another international organisation<sup>6</sup>.

1 Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 18, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2). Practice in this regard is rare, although see *Standard Oil Co (Romano-Americana)* (1925/1928) 5 Hackworth's Digest 702-705; and see also ARSIWA, Commentary to Article 18, para (7). As to coercion as a factor vitiating consent in the law of treaties see PARA 103.

2 See ARSIWA, Commentary to Article 18, para (2).

3 See ARSIWA, Commentary to Article 18, para (2). As to force majeure as a circumstance precluding wrongfulness see PARA 366; as to the possible responsibility of a state which aids or assists another state in the commission of an internationally wrongful act see PARA 370; as to the possible responsibility of a state which directs or controls another state in the commission of an internationally wrongful act see PARA 371.

4 See ARSIWA, Commentary to Article 18, para (3)

5 See ARSIWA, Commentary to Article 18, para (4).

6 Draft Articles on Responsibility of International Organizations ('DARIO') draft art 15, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV.

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### **(3) THE CONTENT OF INTERNATIONAL RESPONSIBILITY**

#### **373. In general.**

Every internationally wrongful act of a state or international organisation entails the international responsibility of that state or international organisation<sup>1</sup>. Accordingly, the international responsibility of a state or international organisation arises as the result of the breach of an international obligation by conduct which is attributable to the state or international organisation<sup>2</sup>.

The content of international responsibility consists of a number of legal consequences which occur upon the commission of an internationally wrongful act<sup>3</sup>. The principal consequence is the coming into existence of new obligations, sometimes referred to as secondary obligations, for the responsible state or international organisation<sup>4</sup>. In this regard, the most important obligation incumbent upon the responsible state or international organisation is that requiring it to make reparation in an adequate form for the breach of the international obligation<sup>5</sup>. In addition, obligations arise for the responsible state or international organisation to cease the internationally wrongful act if it is of a continuing character, and, if appropriate, to provide appropriate assurances and guarantees of non-repetition<sup>6</sup>. Exceptionally, as the result of certain serious breaches of obligations deriving from peremptory norms of international law, obligations may arise for actors other than the state or international organisation responsible for the internationally wrongful act<sup>7</sup>. Depending upon the character and content of the obligation breached, the secondary obligations in question may be owed to one or more states, one or more international organisations, or to the international community as a whole<sup>8</sup>. Further, it appears that the beneficiary of the obligation to make reparation may be an entity other than a state or an international organisation<sup>9</sup>. The coming into existence of these secondary obligations does not affect the continuing obligation to perform the underlying primary obligation which has been breached<sup>10</sup>.

1 Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 1, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); draft Articles on Responsibility of International Organizations ('DARIO') draft art 3, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV.

2 As to attribution see PARA 337 et seq; as to breach of an international obligation see PARA 359 et seq.

3 See ARSIWA art 28; DARIO art 27. See also eg *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 195-197 (paras 143-148); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (para 251); *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 58 (para 115). As to the objective nature of international responsibility see PARA 329.

4 The distinction between the primary obligation breached and the secondary obligations arising as a consequence is to be distinguished from the distinction sometimes drawn between primary (substantive) rules of international law and the secondary rules of the law of international responsibility, as to which see PARA 330.

5 *Factory at Chorzów (Jurisdiction)* PCIJ Ser A No 9 at 21 (1927); and *Factory at Chorzów* PCIJ Ser A No 17 at 47 (1928). As to the obligation to make reparation see PARA 374 et seq.

6 See PARA 381.

7 See PARA 382.



8 See ARSIWA art 33(1); DARIO draft art 32(1). As to the possibility of a plurality of injured states or international organisations see ARSIWA art 46; and DARIO draft art 46.

9 See ARSIWA art 33(2); DARIO draft art 32(2). As to the possibility that a state or international organisation which is not injured by an internationally wrongful act may invoke the responsibility of the responsible state or international organisation and claim performance of the obligation of reparation on behalf of the injured state or international organisation or any other beneficiary of the obligation breached see ARSIWA art 48(2)(b); and DARIO draft art 48(4)(b). As to the possibility that such states may also require cessation and, if appropriate, the provision of assurances and guarantees of non-repetition see ARSIWA art 48(2)(a); and DARIO draft art 48(4)(b).

10 See ARSIWA art 29; DARIO art 28. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 197 (para 150).

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### **374. The obligation to make reparation.**

It is a fundamental principle of international law that the breach of an international obligation involves an obligation to make reparation in an adequate form<sup>1</sup>. The obligation upon the responsible state is to make full reparation for the injury caused by the internationally wrongful act; reparation must, so far as possible, wipe out the consequences of the breach of obligation and re-establish the situation which would, in all probability, have existed if the internationally wrongful act had not been committed<sup>2</sup>. For these purposes, injury includes any damage, whether material or moral, caused by the internationally wrongful act<sup>3</sup>.

Reparation may take various forms, consisting of one or more of restitution, the payment of compensation or the provision of satisfaction, either singly or in combination<sup>4</sup>.

1 See *Factory at Chorzów (Jurisdiction)* PCIJ Ser A No 9 at 21 (1927); (*Merits*) PCIJ Ser A No 17 at 47 (1928). See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 81 (para 152); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002, 3 at 31-32 (para 76); *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 59 (para 119); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 198 (para 152); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (para 259); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 460). See also the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 31(1), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); draft Articles on Responsibility of International Organizations ('DARIO') draft art 30(1), Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. See also the Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 36(2)(d) (the Optional Clause) which includes 'the nature or extent of the reparation to be made for the breach of an international obligation' among the matters in relation to which states may accept the compulsory jurisdiction of the court to resolve disputes. Where the jurisdiction of the International Court of Justice derives from a specific treaty provision, a dispute regarding the appropriate remedies for violation of one of the provisions of the treaty is a dispute that arises out of its interpretation or application and accordingly falls within the court's jurisdiction; as such where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the court to consider the remedies a party has requested for the breach of the obligation: see eg *Factory at Chorzów (Jurisdiction)* PCIJ Ser A No 9 at 22 (1927); *LaGrand (Germany v United States of America)* ICJ Reports 2001, 466 at 485 (para 48).

2 *Factory at Chorzów* PCIJ Ser A No 17 at 47 (1928); *Martini Case* 2 RIAA 975 at 1002 (1930); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002, 3 at 31-32 (paras 76-77); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (para 259); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 460) (referring to art 31 ARSIWA).

3 See ARSIWA art 31(2); DARIO draft art 30(2).

4 See ARSIWA art 34; DARIO draft art 33. As to restitution see PARA 375; as to compensation see PARA 376 et seq; as to satisfaction see PARA 380.

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### 375. Restitution.

Given that the underlying purpose of the obligation of reparation is to re-establish, so far as possible, the situation which would have existed if the wrongful act or omission had not occurred<sup>1</sup>, restitution in kind (*restitutio in integrum*) constitutes the primary form of reparation<sup>2</sup>. The obligation to make restitution does not apply to the extent that restitution is materially impossible<sup>3</sup>, or to the extent that provision of restitution would involve a burden out of all proportion to the benefit deriving from restitution instead of compensation<sup>4</sup>.

Where restitution is not materially possible, the obligation to make reparation may be limited to an obligation to pay compensation or provide satisfaction<sup>5</sup>. Even where restitution may in theory be possible, a claimant state may claim monetary compensation in its place<sup>6</sup>.

As a matter of the law of England, the secondary obligation of restitution incumbent on the United Kingdom as a matter of the customary international law of state responsibility as the result of the breach of an obligation under a treaty may not be relied upon in order to enforce indirectly that treaty obligation<sup>7</sup>.

1 See PARA 374.

2 For instance, the release of a person unlawfully detained (see eg *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3 at 44-45 (para 95)); the repeal or rescission of a legal or executive measure or a judgment (*Martini Case* 2 RIAA 975 at 1002 (1930); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002, 3 at 32-34 (paras 76-78)); the refund of customs duties or taxes which were levied unlawfully (*Compagnie Générale des Asphaltes de France* 9 RIAA 389 (1903); *Palmarejo and Mexican Gold Fields Ltd* 5 RIAA 298 at 302 (1931)); or the allocation of premises for use as a foreign embassy or consulate (*British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 726 (1925)). Territorial disputes may be settled by restitution of territory: see *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* ICJ Reports 1962, 6 (where the court also held that Thailand should return certain objects removed from the temple); and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 198 (paras 152-153) (held that Israel was obliged to return the 'land, orchards, olive groves and other immovable property' seized from natural or legal persons in order to construct the wall in breach of international law).

3 Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 35(a), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); draft Articles on Responsibility of International Organizations ('DARIO') draft art 34(a), Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. Restitution may be impossible for material reasons (eg where a ship which has been unlawfully seized has subsequently been sunk), for legal reasons (eg where a state has, in the exercise of its sovereign powers, put an end to a contract or a licence, or any other foreign investor's entitlement, specific performance must be deemed legally impossible: see *Occidental Petroleum Corp'n and Occidental Petroleum and Exploration Co v Republic of Ecuador* ICSID Case No ARB/06/11, Decision on Provisional Measures of 17 August 2007, at paras 75-81; *Government of Kuwait v American Independent Oil Co (Aminoil)* (1982) 66 ILR 519 at 533). The incidence of the rights of third parties may also lead to a conclusion that restitution is impossible: see eg *Forests of Central Rhodope* 3 RIAA 1406 at 1432 (1933) (although in that case there were a number of other factors which in combination formed the basis for the conclusion that restitution was not possible). Where the jurisdiction of an arbitral tribunal is based on a compromise, the particular terms thereof may give the tribunal discretion to decide on the most appropriate form of reparation, and it may either grant pecuniary compensation or leave the choice of which of the means of reparation should be provided to the respondent state: see eg *Walter Fletcher Smith* 2 RIAA 913 at 918 (1929); *Forests of Central Rhodope* 3 RIAA 1406 at 1432 (1933); *Junghans* 3 RIAA 1845 at 1850 (1939).

4 ARSIWA art 35(b); DARIO draft art 34(b).

5 See eg *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7 at 81 (para 152); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v*

*Serbia and Montenegro*) 26 February 2007, para 460. As to compensation see PARA 376 et seq; as to satisfaction see PARA 380.

6 See *Factory at Chorzów* PCIJ Ser A No 17 at 47 (1928). See also ARSIWA art 43(2)(b); DARIO draft art 43(2)(b).

7 See *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, [2002] 4 All ER 1028, at [36]-[41].

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### 376. Compensation.

Reparation for breach of an international obligation may consist of a pecuniary payment, normally referred to as compensation<sup>1</sup>. The claimant state may choose to claim compensation instead of restitution, and may be required to do so to the extent that restitution is materially impossible<sup>2</sup>. The requirement that reparation be full presupposes the payment of such a sum as would put the claimant so far as possible in a financial position identical to that in which he would have been placed had restitution been made<sup>3</sup>. The value of compensation must therefore be calculated as at the date of the award or judgment and not as at the date of the unlawful act<sup>4</sup>. Arbitral tribunals have rejected claims for punitive or exemplary damages inspired by disapproval of an unlawful act and as a measure of deterrence<sup>5</sup>.

1 *Factory at Chorzów* PCIJ Ser A No 17 at 27 (1928); *The 'Lusitania'* 7 RIAA 32 at 34 (1923). In some of the older cases, this form of reparation is referred to as 'indemnity'. For detailed consideration of the principles applicable to calculation of compensation, see Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') Commentary to Article 36, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2).

2 As to restitution see PARA 375.

3 See PARA 374.

4 In *Factory at Chorzów* PCIJ Ser A No 17 (1928), the court distinguished between a lawful taking of property, for which the compensation would be computed on the basis of the market value of the property at the date of the dispossession and interest to the date of payment, and an unlawful taking, as in that case where the taking amounted to a violation of a treaty, in which the compensation should be based on the value of the property including any increase in value since the time of the taking and loss of profits. As to loss of profits see PARA 377. If an object is destroyed, the replacement cost is the basis for computation of compensation: *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 735 (1925). As to compensation for expropriation of property see PARA 473.

5 *The 'Lusitania'* 7 RIAA 32 at 39, 43 (1923); *Responsibility of Germany to Portugal (Cysne)* 2 RIAA 1035 at 1077 (1930); *Trail Smelter* 3 RIAA 1905 at 1932, 1954 (1935/1941); *Torrey* 9 RIAA 225 (1903); *The 'Carthage'* 11 RIAA 457 (1913); *The 'Manouba'* 11 RIAA 471 (1913); *Vélasquez Rodríguez v Honduras (Reparations and Costs)* (1989) Inter-Am Ct HR (Ser C) No 7. Cf *The 'I'm Alone'* 3 RIAA 1609 (1935), in which payment of a sum of \$25,000 was ordered by way of reparation for the violation of the flag on the high seas; however, the report was of a conciliation and advisory board and not an arbitral award. In some older cases involving personal injury to nationals, small amounts were awarded to the claimant government by way of sanction as part of the measure of damages; this seems to have been done in most cases in order to persuade the delinquent government to improve its system of justice: see the *Putnam Case* 4 RIAA 151 (1927); *Massey Case* 4 RIAA 155 (1927); *Kennedy Case* 4 RIAA 194 (1927); *Venable* 4 RIAA 219 (1927); *Mecham Case* 4 RIAA 440 (1929); *Richeson* 6 RIAA 325 (1933). Penal damages based on the theory of implied state complicity have been rejected: *Janes Case* 4 RIAA 82 (1926). Cf the award of a substantial sum for 'moral damage' in *Desert Line Projects LLC v Republic of Yemen* ICSID Case No ARB/05/17, Award of 6 February 2008, at paras 289-290.

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### **377. Compensation for loss of profits.**

In view of the principle that compensation for breach of an international obligation requires that the claimant be placed in a financial position identical with that in which he would have been had restitution been made<sup>1</sup>, loss of expected profits constitutes part of the compensation required<sup>2</sup>. In cases of repudiation of state contracts, a distinction has often been drawn between actual losses and expenses (*damnum emergens*) and loss of profits (*lucrum cessans*)<sup>3</sup>. Both have been allowed<sup>4</sup>, provided, in the case of loss of profits, that they are not too remote or speculative, and that they were earnings which could have been possible in the ordinary course of events<sup>5</sup>.

1 See PARAS 374-375.

2 *Factory at Chorzów* PCIJ Ser A No 17 at 53 (1928); see also *Cape Horn Pigeon* 9 RIAA 63 (1902); *Norwegian Shipowners Case* 1 RIAA 307 at 338 (1922); *The 'Kate'* 6 RIAA 77 at 81 (1921); *Thomas E Bayard* 6 RIAA 154 (1925).

3 *Delagoa Bay Railway Co* (1893) Moore Int Arb 1865; *May* 15 RIAA 47 at 71 (1900); *Shufeldt* 2 RIAA 1079 at 1099 (1930); *Walter Fletcher Smith* 2 RIAA 913 (1929).

4 *Oliva* 10 RIAA 600 (1903); *Rudloff Case* 9 RIAA 244 (1903); *Tattler* 6 RIAA 48 (1920); *Sonora Land and Timber Co* 5 RIAA 263 (1931); *Factory at Chorzów* PCIJ Ser A No 17 at 57 (1928); *SS 'Wimbledon'* PCIJ Ser A No 1 at 32 (1923).

5 *Cape Horn Pigeon* 9 RIAA 63 (1902); *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 658 (1925); *Shufeldt* 2 RIAA 1079 (1930); *Phillips Petroleum Co v Islamic Republic of Iran* 21 Iran-US CTR 79 (1989).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/12. INTERNATIONAL RESPONSIBILITY/(3) THE CONTENT OF INTERNATIONAL RESPONSIBILITY/378. Causation and remoteness of damage.

### **378. Causation and remoteness of damage.**

Given that the obligation to make reparation of the state or international organisation responsible for the breach of an international obligation is to efface all the consequences of the unlawful act, the obligation to make reparation extends so as cover all those consequences which flow from the breach of the obligation and are proximate consequences of it<sup>1</sup>. Losses which are the consequence only of an unexpected concatenation of circumstances are excluded<sup>2</sup>. The conduct of the victim as contributing to his losses may be taken into account<sup>3</sup>.

1 *Administrative Decision No II (United States v Germany)* 7 RIAA 23 at 29, 30 (1923); *Administrative Decision No VII (United States v Germany)* 7 RIAA 330 (1926); *China Navigation Co Ltd* 6 RIAA 64 (1921). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 462) (in which the International Court of Justice framed the test in terms of whether there was a 'sufficiently direct and certain causal nexus' between the internationally wrongful act and the injury suffered, and concluded that the requisite causal nexus between the violation of the obligation to prevent genocide and the damage resulting from the commission of genocide by third parties had not been established).

2 See eg *Responsibility of Germany for Damage to Portuguese Colonies ('Naulilaa')* 2 RIAA 1011 at 1031 (1928); *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 658 (1925); *Provident Mutual Life Insurance Co* 7 RIAA 91 at 112, 113 (1924); *Garland Steamship Corp* 7 RIAA 73 (1924).

3 *Responsibility of Germany to Portugal (Cysne)* 2 RIAA 1035 at 1076 (1930); *Dix* 9 RIAA 119 (1903); *Roberts* 9 RIAA 204 (1903). Generally, in the determination of reparation, account is to be taken of any contribution to the injury suffered by any wilful or negligent action or omission on the part of the injured state or international organisation, or of any individual or entity in relation to which reparation is sought: see Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 39, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); draft Articles on Responsibility of International Organizations ('DARIO') draft art 38, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/12. INTERNATIONAL RESPONSIBILITY/(3) THE CONTENT OF INTERNATIONAL RESPONSIBILITY/379. Interest.

### 379. Interest.

Given the overall aim of reparation of wiping out all the consequences of an internationally wrongful act, the payment of interest may constitute a proper element in the award of compensation, given that it makes good the loss of the claimant of the use of the principal sum during the period in which the principal sum has been withheld<sup>1</sup>. Generally, interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled<sup>2</sup>. In cases where property has been taken and destroyed, if no allowance for loss of profits is made, interest will normally run from the date of the taking<sup>3</sup>. In cases of personal injuries, where a lump sum is awarded for all damage sustained, or in the case of liquidated debts, interest runs only from the date of the award<sup>4</sup>. The rate of interest is not fixed<sup>5</sup>, but should be set so as to compensate for the actual loss suffered<sup>6</sup>. In general claims for compound interest have been rejected<sup>7</sup>, although in exceptional circumstances an award for compound interest may be appropriate in order to ensure full reparation<sup>8</sup>.

1 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 38(1), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); draft Articles on Responsibility of International Organizations ('DARIO') draft art 37(1), Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. See also *Illinois Central Railroad Co* 4 RIAA 134 (1926); *Administrative Decision No III (United States v Germany)* 7 RIAA 64 at 66 (1923); *Islamic Republic of Iran v United States of America (Case A-19)* 16 Iran-US CTR 285 at 289-290 (1987). Interest should be specifically requested and the claim for interest should be included with the principal claim: *Friede* 26 ILR 352 (1956). If interest is not requested, a tribunal may not be able to award it: see eg *Postal Claim* 9 RIAA 328 (1903).

2 See ARSIWA art 38(2); DARIO draft art 37(2)

3 *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 657, 697, 735 (1925); *Bethune Case* 6 RIAA 32 (1914); *Administrative Decision No III (United States v Germany)* 7 RIAA 64 (1923); *National Paper and Type Co* 4 RIAA 327 (1928); *Cook* 4 RIAA 661 (1930); *Shufeldt* 2 RIAA 1079 at 1101 (1930). Where the wrong is a refusal to pay, it is committed at the time of the refusal, and interest begins to run at that date: *Stevenson* 9 RIAA 494 at 510 (1903).

4 *SS 'Wimbledon'* PCIJ Ser A No 1 at 32 (1923); *Administrative Decision No III (United States v Germany)* 7 RIAA 64 (1923); *Trail Smelter* 3 RIAA 1905 at 1933 (1935/1941). However, in some claims involving personal injuries, claims for interest have been disallowed altogether: *De Sabla Case* 6 RIAA 358 (1933); *Faulkner Case* 4 RIAA 67 (1926).

5 In *SS 'Wimbledon'* PCIJ Ser A No 1 (1923), the Permanent Court of International Justice took into account the financial situation of the world and the conditions prevailing for public loans and awarded 6%. In *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 650 (1925), interest at 7% was awarded as the rate prevailing in Morocco; the same rate was awarded in *Pinson* 5 RIAA 327 (1928) as the rate prevailing in Mexico.

6 See ARSIWA art 38(1); DARIO draft art 37(1); and *Norwegian Shipowners Case* 1 RIAA 307 (1922). A contractual rate of interest may also be awarded; see eg *Zohrer* 6 RIAA 272 (1928).

7 See eg *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 650 (1925); *French Claims against Peru* 1 RIAA 215 at 220 (1920); *Norwegian Shipowners Case* 1 RIAA 307 at 341 (1922); *RJ Reynolds Tobacco Co v Government of the Islamic Republic of Iran* 7 Iran-US CTR 181 at 191-192 (1984).

8 See ARSIWA Commentary to Article 38, paras (8), (9); and see *Compañía del Desarrollo de Santa Elena, SA v Republic of Costa Rica* ICSID Case No ARB/96/1, Award of 17 February 2000, 5 ICSID Reports 157 at paras 103-105.



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### **380. Satisfaction.**

The responsible state or international organisation is under an obligation to provide satisfaction for the injury caused by its internationally wrongful act to the extent that that injury cannot be made good by restitution or compensation<sup>1</sup>. Satisfaction may take the form of an acknowledgment of the breach, an expression of regret, a formal apology or any other appropriate modality<sup>2</sup>. Where a dispute involving questions of international responsibility has resulted in litigation, a judicial declaration that there has been a breach of international law may constitute satisfaction for the injured party<sup>3</sup>. In some cases the court or tribunal may make a declaration of legal rights<sup>4</sup>.

1 Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 37(1), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); draft Articles on Responsibility of International Organizations ('DARIO') draft art 36(1), Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV.

2 ARSIWA art 37(2); DARIO draft art 36(2). However, it appears that there are some limits upon the forms of satisfaction which may be demanded, in so far as satisfaction may not be out of proportion to the injury or take a form humiliating to the responsible state or international organisation: ARSIWA art 37(3); DARIO draft art 36(3).

3 See eg *The 'Carthage'* 11 RIAA 457 (1913); *The 'Manouba'* 11 RIAA 471 (1913); *Corfu Channel (United Kingdom v Albania)* ICJ Reports 1949, 4 at 35, 113, 114; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002, 3 at 31 (para 75); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 463); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* ICJ Reports, 4 June 2008 (paras 203-205).

4 See eg *Mavrommatis Jerusalem Concessions* PCIJ Ser A No 5 at 44, 51 (1925).

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### **381. Cessation and assurances and guarantees of non-repetition.**

In the case of a breach of a continuing character<sup>1</sup>, quite apart from the continued duty to comply with the underlying primary obligation breached<sup>2</sup>, there arises an obligation incumbent upon the responsible state to cease the continuing wrongful conduct<sup>3</sup>. In addition, in an appropriate case, the responsible state may be under an obligation to provide assurances and guarantees of non-repetition<sup>4</sup>.

1 As to breaches of continuing character see PARA 360.

2 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 29, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); draft Articles on Responsibility of International Organizations ('DARIO') draft art 28, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV.

3 ARSIWA art 30(a); DARIO draft art 29(a). See *Haya de la Torre (Colombia/Peru)* ICJ Reports 1951, 71 at 82; *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3 at 44 (para 95); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Reports 1986, 14 at 149 (para 292(12)); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 197 (para 150); *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 68 (para 148) (request for an order requiring cessation refused on the basis that the breach was not of a continuing character); and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (para 254).

4 ARSIWA art 30(b); DARIO draft art 29(b). See *LaGrand (Germany v United States of America)* ICJ Reports 2001, 466 at 512-513 (para 124); and *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 68-69 (paras 149-150) (in both of which the International Court of Justice declined to make orders requiring the provision of assurances or the giving of guarantees of non-repetition on the basis that the commitments expressed by the respondent state as to steps to be taken in the future to avoid further breaches had to be regarded as meeting the requests). See also *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* (Mexico v United States of America) ICJ Reports, 19 January 2009 (paras 58-60); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* ICJ Reports 2002, 303 at 452 (para 318) (while recognising that a request to require the respondent state to give assurances and guarantees of non-repetition was undoubtedly admissible, the International Court of Justice declined to make such an order on the basis that its judgment had defined the boundary and it was not possible to envisage a situation in which either party would not respect the territorial integrity of the other); and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (paras 256-257).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/12. INTERNATIONAL RESPONSIBILITY/(3) THE CONTENT OF INTERNATIONAL RESPONSIBILITY/382. Obligations arising for third states as the result of serious breaches of obligations arising under peremptory norms of general international law.

### **382. Obligations arising for third states as the result of serious breaches of obligations arising under peremptory norms of general international law.**

It appears that in relation to certain breaches of international law, obligations may arise for all other third states or international organisations<sup>1</sup>. In this regard, it would appear that the relevant category is that of serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*)<sup>2</sup>. In relation to such breaches, at least in certain circumstances, third states and international organisations may be under an obligation to cooperate to bring the breach to an end through lawful means, not to recognise as lawful any situation created by a such a breach, nor to render any aid or assistance in maintaining that situation<sup>3</sup>.

1 See the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') arts 40, 41, Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); draft Articles on Responsibility of International Organizations ('DARIO') draft arts 40, 41, Report of the International Law Commission, 61st Session (2009), A/64/10, ch IV. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* ICJ Reports 1971, 16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 197 (para 148).

2 ARSIWA art 40, 41; DARIO drafts arts 40 and 41. See also ARSIWA, Commentary to Article 40, paras (4)-(6). In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 199-200 (paras 155-159), the International Court of Justice appeared to attach the consequences for third states and international organisations to the *erga omnes* character of the obligations in question, rather than to the fact that they constitute peremptory norms (*jus cogens*), although the relevant passages of the court's advisory opinion are far from clear in this regard. According to the approach taken by the International Law Commission ('ILC') in order to attract the additional consequences a breach of an obligation arising under a peremptory norm must be serious, and will be serious if it involves a 'gross or systematic failure' to comply with the obligation in question: ARSIWA, Commentary to Article 40, para (7). As to peremptory norms of international law (*jus cogens*) and obligations *erga omnes* see PARA 11.

3 ARSIWA art 41; DARIO draft art 41. The existence of such obligations for third states and international organisations is relatively well established in relation to illegal territorial situations (for instance, the unlawful annexation of territory, or the unlawful denial of self-determination to the population of a territory: see eg *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* ICJ Reports 1971, 16; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136 at 200 (paras 159, 160). However, whether or not such obligations arise as a matter of customary international law in relation to other serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*) is far from clear. For English decisions in this regard see *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579, [2008] All ER (D) 123 (Aug) at [170]-[183] (the *jus cogens* prohibition of torture did not entail any obligation for the government to disclose documents which could help prove that an individual had been subjected to torture); *R (on the application of Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2006] EWHC 972 (Admin), [2006] NLJR 797, (2006) Times, 19 May at [69]-[70] (affd on other grounds [2006] EWCA Civ 1279, [2008] QB 289, [2007] 2 WLR 1219); *R (on the application of Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin) at [57]; and cf *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221, [2006] 1 All ER 575 at [34].

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/13. DIPLOMATIC PROTECTION AND CONSULAR ASSISTANCE/(1) IN GENERAL/383. Introduction.

## **13. DIPLOMATIC PROTECTION AND CONSULAR ASSISTANCE**

### **(1) IN GENERAL**

#### **383. Introduction.**

A distinction is to be drawn between, on the one hand, the exercise of diplomatic protection by a state<sup>1</sup> and, on the other, the provision of measures of consular assistance<sup>2</sup>. Both types of action fall within the much broader category of action which may be taken by states on the international plane in reaction to the actions of other states, which includes also the making of diplomatic representations or demarches<sup>3</sup>.

1 As to diplomatic protection see PARAS 385-411.

2 As to the actions which states have the right to take by way of consular assistance see PARAS 412-420.

3 As to the distinctions between the types of action see PARA 384.

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**384. Distinction between diplomatic protection, consular assistance and other forms of action by states on the international plane.**

In its strict sense, diplomatic protection refers to the invocation by one state of the international responsibility of another state arising as a result of an alleged violation of international law committed by the other state in relation to persons, whether natural or legal, having the nationality of the invoking state<sup>1</sup>. Diplomatic protection may be exercised either by diplomatic action, including the direct presentation of a claim by the national state of the injured person to the responsible state, or by other means of peaceful settlement of disputes, including, where jurisdiction exists, the bringing of a claim before an international court or tribunal. Consular assistance encompasses those actions which a state has a right to take under international law in relation to its nationals within the territory of another state, including in particular certain specific rights in relation to nationals who have been arrested or otherwise detained<sup>2</sup>. Such actions by way of consular assistance are normally carried out by the consular officers of the state of nationality, present in the other state for that purpose<sup>3</sup>. Given that they involve the invocation of the responsibility of another state in relation to injury caused to a national, measures taken by way of diplomatic protection are by their nature essentially remedial and are aimed at ensuring the implementation of the secondary obligations of the international law of responsibility arising upon the commission of an internationally wrongful act<sup>4</sup>. By contrast, measures taken by way of consular assistance will often not envisage a situation of breach of international law at all, in particular in so far as they relate to the mere provision of assistance to nationals of the state, and in any case are largely preventive and aimed at preventing a national of a state from being subjected to an internationally wrongful act<sup>5</sup>. The exercise of diplomatic protection and the taking of action by way of consular assistance form part of the far wider category of actions which it is open to a state to take on the international plane in relation to the actions of other states, which includes the making of diplomatic representations or demarches. That category covers a spectrum of possible action which includes, for instance, an expression of concern as to whether particular actions of another state are consistent with its obligations under international law, a call for an inquiry into particular events in another state, or an informal call for compliance by the other state with its international obligations. In addition, a state may formally invoke the responsibility of the other state, whether specifically by way of diplomatic protection in relation to the treatment of a national, or more generally in relation to the breach by the other state of any other obligation owed to the invoking state<sup>6</sup>. However, such diplomatic representations or demarches do not necessarily involve any allegation of internationally wrongful conduct on the part of the other state or the invocation of its international responsibility; for instance, given the absence of any clear prohibition of the imposition of the death penalty as a matter of general international law, this will often be the case in relation to pleas for clemency. Diplomatic representations or demarches may be made in relation to the treatment of any individual alleged to be in breach of international law, including in relation to the treatment of individuals who are not nationals of the state making the representation and even as regards the treatment of nationals of the state to which the representations are made. To the extent that such diplomatic representations and demarches do not constitute the exercise of diplomatic protection in relation to an injury caused to a national, the specific rules of the law of diplomatic protection as to nationality and exhaustion of local remedies are not applicable and there is no need to comply with them<sup>7</sup>. In international practice and usage the exact dividing lines between the exercise of diplomatic protection and other diplomatic

representations or demarches, as well as those between those measures and actions taken by way of consular assistance, are far from clear<sup>8</sup>, and a similar imprecision in the use of the terms is apparent in some decisions of the English courts<sup>9</sup>.

1 As to diplomatic protection see PARAS 385-411. As to the nature of diplomatic protection under international law see PARA 386; and as to the requirement of nationality see PARA 391.

2 As to consular assistance see PARA 412 et seq.

3 As to consular officers see PARA 30. Nevertheless, particular actions constituting consular assistance may in certain cases be undertaken by the state's diplomatic personnel: cf Convention on Consular Relations (Vienna, 24 April 1963; 596 UNTS 262; TS 14 (1973); Cmnd 5219) art 70.

4 See the Articles on Diplomatic Protection ('ADP'), Commentary to Article 1, para (9), Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV. As to state responsibility and the notion of an internationally wrongful act see PARA 327 et seq.

5 See ADP, Commentary to Article 1, para (9).

6 As to the distinction between direct claims and claims made by way of diplomatic protection see PARA 387.

7 As to the requirement of nationality in claims by way of diplomatic protection see PARA 391 et seq; and as to the requirement to exhaust local remedies in claims by way of diplomatic protection see PARA 405 et seq. As to the possibility that a state may invoke the responsibility of the state responsible for breaches of certain obligations even if one of its nationals or the state itself is not directly injured thereby see *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 33 (para 32) (obligations erga omnes). See also the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 48, Report of the International Law Commission, 53rd Session, A/56/10, YILC 2001, vol II(2); and PARAS 329, 373.

8 See eg Warbrick 'Diplomatic Representations and Diplomatic Protection' (2002) 51 ICLQ 723; Künzli 'Exercising Diplomatic Protection: The Fine Line Between Litigation, Demarches and Consular Assistance' (2006) 66 ZaöRV 321.

9 See eg the use of the terms in *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2002] All ER (D) 70 (Nov); and *R (on the application of Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs (United Nations High Commissioner for Refugees intervening)* [2006] EWCA Civ 1279, [2008] QB 289, [2006] All ER (D) 138 (Oct).

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## **(2) DIPLOMATIC PROTECTION**

### **(i) Introduction**

#### **385. General considerations.**

Diplomatic protection consists of the invocation by a state, through diplomatic action or other means of peaceful settlement, of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state with a view to the implementation of such responsibility<sup>1</sup>. As such it is a specific sub-category of the general international law of state responsibility, relating specifically to the invocation of the responsibility of a state as a consequence of breaches of international law committed in relation to the nationals of another state. As a result, except in the case of contrary agreement between the states in question<sup>2</sup>, the general rules of state responsibility apply in relation to claims made by way of diplomatic protection as concerns questions such as attribution of conduct to the allegedly responsible state<sup>3</sup>, whether or not an international obligation has been breached<sup>4</sup>, and the content and implementation of the international responsibility which arises as a result of the internationally wrongful conduct which is attributable to the responsible state, including, in particular, the obligation to make reparation<sup>5</sup>. Nevertheless, claims made by way of diplomatic protection are subject to specific rules which are left by the general law of state responsibility to the more specific rules of diplomatic protection<sup>6</sup>. These specific rules relate to the nationality of the persons, corporations, ships and aircraft in relation to which a state may invoke the responsibility of the responsible state and the related rules concerning the nationality of claims<sup>7</sup>; and the requirement of exhaustion of local remedies as a precondition for the presentation or admissibility of an international claim by way of diplomatic protection<sup>8</sup>.

1 See eg the Articles on Diplomatic Protection ('ADP') art 1, Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV. The International Court of Justice has confirmed that that definition reflects customary international law: *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (para 39). As to state responsibility and the invocation of responsibility see PARA 327 et seq.

2 As to the principle of *lex specialis* in the law of state responsibility see PARA 332.

3 See PARA 337 et seq.

4 See PARA 359 et seq.

5 See PARA 374. As to the content of international responsibility see PARA 373 et seq.

6 The ILC dealt with diplomatic protection as a topic distinct from the general law of state responsibility, although the inter-relationship of the two areas of law is expressly recognised in the ILC Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA'), International Law Commission Report, 53rd Session, A/56/10, YILC 2001, vol II(2). See eg ARSIWA art 44, which deals with the admissibility of claims and provides that the responsibility of a state may not be invoked if the claim is not brought in accordance with any applicable rule relating to the nationality of claims (see the text and note 7), or the claim is one to which the rule of exhaustion of local remedies applies and any effective and available local remedy has not been exhausted (see the text and note 8); and PARA 330.

7 As to nationality and nationality of claims see PARA 391 et seq.

8 As to exhaustion of local remedies see PARA 405.



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### **386. Nature of diplomatic protection.**

In the classic formulation, in bringing an international claim by way of diplomatic protection on behalf of one of its nationals, a state was to be treated as in reality asserting its own rights, namely the right to ensure, in the person of its subjects, respect for the rules of international law<sup>1</sup>. Strong vestiges of that traditional approach remain in the modern law of diplomatic protection, in particular in the general rule that only the national state of an injured person may bring a claim by way of diplomatic protection on his, her or its behalf<sup>2</sup>. Historically, the exercise of diplomatic protection arose principally in the context of violations of international standards as to the treatment of aliens and their property under customary international law<sup>3</sup>. However, as a result of the development of the rights recognised as belonging to individuals under international law, the scope of the obligations which may be the subject of a claim in the nature of diplomatic protection has expanded so that diplomatic protection is no longer so limited<sup>4</sup>. The exercise of diplomatic protection may thus also concern the invocation of responsibility arising from a breach of obligations under the international law of human rights (whether arising under customary international law or deriving from multilateral human rights instruments)<sup>5</sup>, under other multilateral treaties (for instance, in relation to violations of specific obligations in the field of consular relations)<sup>6</sup>, or under bilateral treaties (including bilateral investment treaties)<sup>7</sup>. In parallel, it has been recognised that at least some of the international obligations the breach of which may be the subject of a claim by way of diplomatic protection may be owed directly to individuals and confer rights on them under international law, irrespective of whether those individuals' rights are to be characterised as constituting human rights<sup>8</sup>.

1 *Mavrommatis Palestine Concessions* PCIJ Ser A No 2 at 12 (1924); *Panevezys-Saldutiskis Railway (Estonia v Lithuania)* PCIJ Ser A/B No 76 at 16 (1939).

2 As to the requirements relating to nationality see PARA 391 et seq.

3 As to the rules of customary international law relating to treatment of aliens and their property see PARA 462 et seq.

4 See *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (para 39).

5 See eg *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005. Many international human rights instruments provide for specific mechanisms by which inter-state complaints may be made, whether or not the victims are nationals of an applicant state: see eg the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the 'European Convention on Human Rights') art 33 (as amended by Protocol 11); claims brought under such mechanisms are not in the nature of diplomatic protection, although there may exist parallel requirements relating to the exhaustion of local remedies (see eg the European Convention on Human Rights art 35 (as amended by Protocol 11)). In that regard, the European Court of Human Rights has held that the conventional rule requiring exhaustion of local remedies contained in the European Convention on Human Rights art 35 does not apply to inter-state applications brought under art 33 in so far as the applicant state does not bring a claim in relation to violations of the rights of particular individuals but rather alleges a breach of the substantive provisions of the Convention as the result of the legislation or administrative practices of the defendant state: see eg *Ireland v United Kingdom* A 25 (1978) 2 EHRR 25, ECtHR.

6 See eg *LaGrand (Germany v United States of America)* ICJ Reports 2001, 466; *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12.

7 However, claims brought on behalf of an investor for breach of a bilateral investment treaty are rare; diplomatic action on behalf of an investor may be excluded to the extent that the host state and the state of the investor are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; TS 25 (1967) Cmd 3255) (the 'ICSID Convention') and the investor and the host state have consented to submit or have submitted the dispute to ICSID arbitration: see art 27. In addition, claims may be made by way of diplomatic protection on behalf of nationals in relation to breach of obligations under other bilateral treaties (eg older bilateral treaties of Friendship, Commerce and Navigation): see eg *Eletronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15. In such cases, the applicability of the specific rules relating to claims by way of diplomatic protection as concerns exhaustion of local remedies depends on whether the essential nature of the claim is direct injury to the state, or whether the state is in reality asserting a claim for injury to its national: see PARA 387.

8 *LaGrand (Germany v United States of America)* ICJ Reports 2001, 466 at 493-494 (paras 76-77); *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 (para 40). As to the right (at issue in both cases) of arrested or otherwise detained individuals to be notified of their consular rights under the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmd 5219) see PARA 415.

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### **387. Distinction between claims by way of diplomatic protection and claims for direct injury to the state.**

Although on the traditional approach the exercise of diplomatic protection was classically justified on the basis that the state, in taking up the claim of its national, was asserting its own rights<sup>1</sup>, international judicial practice nevertheless evidences the existence of a distinction between claims made by way of diplomatic protection and claims by a state concerning direct injury caused to it by a breach of international law. In this respect it is necessary to have regard to the nature of the claim as a whole and whether the essential nature of the claim is such that it is brought preponderantly in relation to an injury to a national<sup>2</sup>. Certain specific types of claim, despite the fact that they relate to actions taken in relation to nationals, are nevertheless not regarded as being brought by way of diplomatic protection but rather as constituting direct claims by the state<sup>3</sup>. The restrictive rules of diplomatic protection, in particular the rule requiring exhaustion of local remedies, are not applicable to such direct actions<sup>4</sup>. In certain cases, a claim brought by a state may appropriately be characterised as concerning the violation of both the individual rights of a national as well as obligations owed to the state and therefore as constituting both a claim by way of diplomatic protection and a claim for direct injury<sup>5</sup>. In such cases, due to the interdependence of the rights of the state and the rights of individuals, the requirement of exhaustion of local remedies may not need to be complied with<sup>6</sup>.

1 As to the nature of diplomatic protection see PARA 386.

2 See eg *Interhandel (Switzerland v United States of America) (Preliminary Objections)* ICJ Reports 1959, 6 at 28-29; *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15 at 43 (paras 51-52). See also the Articles on Diplomatic Protection ('ADP') art 14(3), Commentary to Article 14, paras (9)-(10), Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV. The ILC has taken the view that local remedies must be exhausted in all cases where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national. There appears to be no rule that remedies do not need to be exhausted where a state requests only a declaratory judgment of an international tribunal as to whether a treaty or convention is applicable; what is important is whether the essential nature of the claim is one brought by way of diplomatic protection on behalf of a national: see *Interhandel (Switzerland v United States of America) (Preliminary Objections)* ICJ Reports 1959, 6 at 29, where the non-exhaustion of domestic remedies rule was held to apply even to the alternative claim seeking merely declaratory remedies. See also *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15 at 42-43 (para 51), where the chamber of the court rejected an argument that the rule did not apply in so far as the applicant state sought a merely declaratory judgment; cf, however, *Certain German Interests in Polish Upper Silesia* PCIJ Ser A No 7 at 33-34 (1926) (where, however, the remedy in question was before another international tribunal); *Swiss Confederation v German Federal Republic (No 1)* (1958) 25 Int LR 33 at 42-50 (Arbitral Tribunal for Agreement on German External Debts).

3 This is particularly the case as concerns injury caused to individuals performing representative functions on behalf of the state, in particular diplomatic and consular agents: see eg *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3 (the claims of the claimant included a claim for reparation brought both in its own right and by way of diplomatic protection of its nationals; the respondent state did not participate in the proceedings and no objection on the basis of failure to exhaust local remedies was made, and the court did not advert to the question). A claim based on the violation of the immunity from criminal proceedings before the courts of another state enjoyed by the incumbent foreign minister of a state was not a claim in the nature of diplomatic protection as the claimant state was not seeking to protect the rights of its national, but was rather bringing a claim for a direct violation of its own rights: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002, 3 at 17 (para 40). See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (paras 330-331) (counterclaims based on breach of the Vienna Convention on Diplomatic

Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) due to mistreatment of diplomats of the respondent state and violations of the inviolability of its embassy were held not to be claims in the nature of diplomatic protection as they sought reparation for the direct injury to the respondent itself).

4 For examples of claims made by states which were held to be in the nature of diplomatic protection see eg *Interhandel (Switzerland v United States of America) (Preliminary Objections)* ICJ Reports 1959, 6 at 28-29; *Eletronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15 at 43 (paras 51-52) (alleged violation of a bilateral treaty of Friendship Commerce and Navigation); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (para 333) (counterclaim in relation to mistreatment of nationals of the respondent state not having diplomatic status). See also *LaGrand (Germany v United States of America)* ICJ Reports 2001, 466; *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 (claims of violation of the obligations of notification under the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219) and rights of individuals arising thereunder in part in the nature of claims by way of diplomatic protection and in part a claim of direct injury).

5 See eg *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12.

6 *LaGrand (Germany v United States of America)* ICJ Reports 2001, 466; *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12.

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### **388. Discretion of the executive as to whether and how to exercise diplomatic protection.**

As a consequence of the classical understanding of diplomatic protection as constituting the assertion by a state of an infringement of its own right<sup>1</sup>, as a matter of international law the national state of an individual may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, and should the natural or legal person on whose behalf the state is acting consider that his or its rights are not adequately protected, he or it has no remedy in international law<sup>2</sup>. As a matter of international law, the state is the sole judge of whether its protection will be granted, to what extent it is granted and when it will cease, and in this regard has an absolute discretion which may be determined by considerations of a political or other nature unrelated to the particular case<sup>3</sup>. As a consequence, a state is free to waive a claim by way of diplomatic protection<sup>4</sup>, or to settle or compromise it on whatever terms it sees fit<sup>5</sup>. Nevertheless, although a national has no right to compel the exercise of diplomatic protection as a matter of international law, there is no rule of international law prohibiting the domestic law of the state in question providing such redress<sup>6</sup>. As a matter of the law of England, the exercise of discretion on the part of the executive as to whether to exercise diplomatic protection in respect of a national, or more generally to make other diplomatic representations on his behalf, is not non-justiciable merely on the basis that it concerns an element of the royal prerogative in the field of international relations, and, at least in theory, such decisions are subject to judicial review<sup>7</sup>. However, given its subject matter, the scope of any such review is likely to be extremely restricted; although the courts will not in general interfere with the policy decision as to whether or not to take particular action on behalf of any particular national, a national may have a legitimate expectation that, at the least, consideration will be given by the executive as to whether or not to make diplomatic representations on his behalf or to exercise diplomatic protection<sup>8</sup>.

1 See PARA 386.

2 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 44 (para 78).

3 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 44 (para 79).

4 This follows from the fact that a state is pursuing its own claim. It appears that a national cannot as such waive the claim of the state himself: see the discussion of the Calvo clause in PARAS 408-410. However, see *Tattler* 6 RIAA 48 (1920).

5 *Administrative Decision No V (United States v Germany)* 7 RIAA 119 at 152 (1924).

6 See *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 44 (para 78). Cf, however, the Articles on Diplomatic Protection ('ADP') art 19(a), Commentary to Article 19, paras (2)-(3), Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV.

7 *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2002] All ER (D) 70 (Nov). For similar decisions from other jurisdictions see eg *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893; but cf *Kaunda v President of the Republic of South Africa* [2004] ZACC 5, SA Const Ct; *Khadr v Canada (Minister of Foreign Affairs)* 2004 FC 1145, Can FC; *Hicks v Ruddock* [2007] FCA 299, Aust FC. For further discussion see Vermeer-Künzli 'Restricting Discretion: Judicial Review of Diplomatic Protection' (2006) 75 Nordic Journal of International Law 279.

8     *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 at [104], [2002] All ER (D) 70 (Nov) at [104].

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### **389. Distribution of compensation obtained by diplomatic protection.**

As a further consequence of the classical understanding of diplomatic protection that, in asserting a claim by way of diplomatic protection on behalf of one of its nationals, a state is bringing a claim for an infringement of its own rights<sup>1</sup>, as a matter of international law there is probably no obligation requiring a state which has successfully obtained compensation in respect of damage done to one of its nationals to pay that compensation to the injured person<sup>2</sup>. As a matter of the law of England, even where the executive has called for individuals to submit details of any damage suffered by reason of violation of international law, moneys received in settlement of such international claims are not received by the Crown as agent or trustee for the British nationals to which the international claim related, nor as money had and received to their use<sup>3</sup>. Exceptionally however, the Crown may expressly constitute itself agent or trustee of the money for the national<sup>4</sup>. When, by agreement with another state, the Crown has received payment from that other state on account of a wrong done to a British national, the national has no legally enforceable right to such money in the hands of the Crown<sup>5</sup>. In recent times, where compensation has been obtained from foreign governments, it has generally been the practice for the Crown to distribute the compensation through the Foreign Compensation Commission<sup>6</sup>.

1 As to the nature of diplomatic protection see PARA 386.

2 See eg *Finnish Shipowners* 3 RIAA 1479 at 1485 (1934); cf *Administrative Decision No V (United States v Germany)* 7 RIAA 119 at 152 (1924). See also *Civilian War Claimants Association v R* [1932] AC 14, HL; *Lonrho Exports Ltd v Export Credits Guarantee Department* [1999] Ch 158, [1996] 4 All ER 673. Cf however, the Articles on Diplomatic Protection ('ADP') art 19, Commentary to Article 19, paras (5)-(8), Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV.

3 *Civilian War Claimants Association v R* [1932] AC 14, HL.

4 See *Rustomjee v R* (1876) 2 QBD 69 at 74, CA, obiter per Coleridge CJ; *Civilian War Claimants Association v R* [1932] AC 14 at 26-27, HL, obiter per Lord Atkin. However, no such intention on the part of the Crown can be implied from the terms of the agreement with the foreign government.

5 *Rustomjee v R* (1876) 2 QBD 69, CA; *Civilian War Claimants Association v R* [1932] AC 14, HL; *Lonrho Exports Ltd v Export Credits Guarantee Department* [1999] Ch 158, [1996] 4 All ER 673. This follows from the rule that the individual cannot rely on an act of state as a cause of action. As to acts of state see PARA 22 et seq.

6 The Commission was established under the Foreign Compensation Act 1950 s 1. As to the Commission's constitution and powers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 803 et seq. It appears that if the distribution of compensation has been regulated by statute, the claimant may only recover it by following the statutory procedure: see *Baron de Bode v R* (1851) 3 HL Cas 449. The Foreign Compensation Act 1950 did not curtail the prerogative powers of the Crown. In most cases where the Crown has received compensation under global agreements with foreign governments, the Commission has been entrusted with the task of distribution. However, between 1960 and 1962 the Foreign Office decided some 430 pre-war claims of British subjects against Japan and distributed the money itself: see Lillich *International Claims: Post War British Practice* 6, note 36.

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### **390. Conditions for the exercise of diplomatic protection.**

In light of the fact that diplomatic protection constitutes a specific form of state responsibility, before presenting an international claim by way of diplomatic protection based upon another state's responsibility in respect of treatment of individuals, it is generally necessary for the government of the injured state to consider the following questions: (1) whether the claim complies with the applicable rules relating to the nationality of claims<sup>1</sup>; (2) whether the rule which requires any available and effective local remedies to be exhausted is applicable to the claim and, if so, whether any relevant remedies have in fact been exhausted<sup>2</sup>; (3) whether the conduct causing the injury is attributable to the respondent state<sup>3</sup>; (4) whether that conduct fell below the level of treatment of aliens which is required by customary international law, or whether it violated some other international obligation binding the allegedly responsible state in relation to the treatment of individuals<sup>4</sup>; (5) whether the claim has been extinguished by lapse of time or otherwise waived<sup>5</sup>. The issues of nationality and of exhaustion of local remedies relate specifically to the exercise of diplomatic protection and are the main concern of the law of diplomatic protection<sup>6</sup>.

1 As to nationality and the rules relating to continuous nationality of claims see PARA 391 et seq. See also the International Law Commission ('ILC') Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 44, International Law Commission Report, 53rd Session, A/56/10, YILC 2001, vol II(2); and PARA 330.

2 As to the requirement of exhaustion of local remedies see PARAS 405-411. See also ARSIWA art 44; and PARA 330.

3 As to attribution for the purposes of state responsibility see PARA 337 et seq.

4 As to the substantive rules relating to treatment of aliens and their property see PARA 462. As to the categories of rules of international law which may be the subject of a claim in the nature of diplomatic protection see PARA 386.

5 As to acquiescence and waiver of claims generally in the law of state responsibility see PARA 330; and as to the freedom of a state to waive a claim by way of diplomatic protection involving injury to one of its nationals see PARA 388.

6 See PARAS 391-411.



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## **(ii) Nationality and Nationality of Claims**

### **A. IN GENERAL**

#### **391. General considerations.**

A general precondition for the presentation of an international claim made by way of diplomatic protection is that the natural or legal person injured by the act of the responsible state should have the nationality of the claimant state<sup>1</sup>. Further, that nationality should normally have been maintained from the date of injury up to the date of presentation of the claim<sup>2</sup>.

1 See the Articles on Diplomatic Protection ('ADP') art 3, Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV. See also *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (paras 40, 61); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (para 333). The ILC has suggested, expressly by way of progressive development, that an exception to the requirement of nationality as regards individuals should exist by which a state may exercise diplomatic protection on behalf of a stateless person or a refugee lawfully and habitually resident at the date of injury and at the date of the claim; however, even under the proposed rule no action by way of diplomatic protection can be taken against the state of nationality of the refugee: see ADP art 8. It has been held that the proposed rule, at least in so far as it relates to refugees habitually resident in a state, does not represent customary international law: see *R (on the application of Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs (United Nations High Commissioner for Refugees intervening)* [2006] EWCA Civ 1279, [2008] QB 289, [2006] All ER (D) 138 (Oct). As to the ability of the flag state of a ship to bring a claim on behalf of non-nationals who are members of a ship's crew (although this is probably not a true case of diplomatic protection) see PARA 403. As to nationality of individuals see PARA 392; and as to nationality of corporations see PARA 394. As to nationality of claims see PARA 398 et seq.

2 See PARA 399.

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## **B. NATIONALITY**

### **392. Nationality of individuals.**

Nationality, which denotes the quality of political membership of a particular state, is governed primarily by municipal law; in the present state of international law, and subject to any relevant treaty obligations entered into by a state, questions of the nationality of individuals are in principle within its sole jurisdiction<sup>1</sup>. There is a growing body of treaty provisions, binding on the states party to them, relating to questions of nationality of individuals<sup>2</sup>. Although the Universal Declaration of Human Rights<sup>3</sup> asserts that everyone has a right to a nationality<sup>4</sup> that proposition arguably does not reflect customary international law<sup>5</sup>. There exists a rough harmony between national laws relating to nationality which obviates the necessity for international regulation<sup>6</sup>.

1 *Tunis and Morocco Nationality Decrees (Advisory Opinion)* PCIJ Ser B No 4 at 23 (1923); International Convention on Certain Questions Relating to the Conflict of Nationality Laws (The Hague, 12 April 1930; TS 33 (1937); Cmd 5553) art 3. See also the European Convention on Nationality (Strasbourg, 6 November 1997; ETS 166; 2135 UNTS 189) art 3 (although the United Kingdom is not party). The principle extends to the term employed to describe nationality, which in many systems of domestic law, including that of the United Kingdom, is called citizenship: see the British Nationality Act 1981; and **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 5 et seq. Although questions of nationality are in principle for each state to determine, an international court or tribunal may nevertheless have to make findings as to the nationality of an individual applying the rules of domestic law, as well as determine the extent to which the nationality of an individual validly conferred by the domestic law of a state should be recognised and given effect as a matter of international law: see eg *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* ICJ Reports 1955, 4. See also *Soufraki v United Arab Emirates* ICSID Case No ARB/02/7, Decision on Jurisdiction of 7 July 2004, Decision of the ad hoc Committee on the Application for Annulment of 5 June 2007; *Siag and Vecchi v Arab Republic of Egypt* ICSID Case No ARB/05/15, Decision on Jurisdiction of 11 April 2007, Award of 1 June 2009 (both of the latter two cases decided under bilateral investment treaties).

2 See eg the International Convention on Certain Questions Relating to the Conflict of Nationality Laws; the Protocol Relating to a Certain Case of Statelessness (The Hague, 12 April 1930; TS 31 (1937); Cmd 5552); the International Protocol Relating to Military Obligations in Certain Cases of Double Nationality (The Hague, 12 April 1930; TS 22 (1937); Cmd 5460); and the European Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (Strasbourg, 6 May 1963; TS 88 (1971); Cmd 4802) and the various Protocols thereto. See also the Convention on the Nationality of Married Women (New York, 20 February 1957; TS 59 (1958); Cmd 601); and the Convention on the Reduction of Statelessness (New York, 30 August 1961; Misc 27 (1962); Cmd 1825). See further the International Law Commission ('ILC') Draft Articles on Nationality of Natural Persons in relation to the Succession of States, YILC 1999, vol II(2) Ch IV paras 44-45; and in relation to the ILC Draft Articles see United Nations General Assembly Resolution 54/112 of 9 December 1999, General Assembly Resolution 55/153 of 12 December 2000, General Assembly Resolution 59/34 of 2 December 2004, and General Assembly Resolution 63/118 of 11 December 2008. By Resolution 54/112, the General Assembly took note of the ILC Draft Articles, which were annexed to the Resolution, and invited governments to take them into account as appropriate. By Resolution 55/153, the General Assembly reiterated its invitation to governments to take into account, as appropriate, the provisions of the ILC Draft Articles in dealing with issues of nationality of natural persons in relation to the succession of states; and it further encouraged the elaboration, at the regional or sub-regional level, of legal instruments regulating questions of nationality of natural persons in relation to the succession of states, with a view, in particular, to preventing the occurrence of statelessness as a result of a succession of states.

The member states of the Council of Europe have elaborated the Convention on the Avoidance of Statelessness in relation to State Succession (Strasbourg, 19 May 2006; CETS 200). The Convention entered into force for those states party to it on 1 May 2009; the United Kingdom is not a party.

3 See the Universal Declaration of Human Rights (Paris, 10 December 1948; UN 2 (1949); Cmd 7662). As to human rights and freedoms see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq.

4 Universal Declaration of Human Rights art 18(1). Similar provisions are contained in some international human rights treaties: see eg the American Convention on Human Rights 1969 (San José, Costa Rica; 22 November 1969; (1970) 9 ILM 673) art 20. The right to acquire a nationality contained in the International Covenant of Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmnd 6702) is expressly limited to children: art 24(3); and see also the Convention on the Rights of the Child (20 November 1989; TS 44 (1992); Cm 1976) arts 7, 8. As to the prohibition of racial discrimination in relation to questions of nationality see the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966; TS 77 (1966); Cmnd 4108) art 5(d)(iii) (although cf art 1(3)). As to the prohibition of discrimination on the basis of sex in relation to questions of nationality see the Convention on the Elimination of All Forms of Discrimination against Women (New York, 1979; 1239 UNTS 13) art 9(1); as to the obligation to ensure that neither marriage to an alien nor change of nationality by the husband during marriage will automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband see art 9(1); and as to the obligation to grant women rights equal to men with respect to the nationality of their children see art 9(2).

5 The proposition contained in the Universal Declaration of Human Rights art 15(2), to the effect that no one may (in conformity with international law) be arbitrarily deprived of his nationality or be denied the right to change nationality, probably also does not represent customary international law, although some writers have urged that there must be some limit to the apparently absolute discretion of states in the matter of nationality, and in particular that the doctrine of abuse of rights does or should apply. A similar provision is contained in the American Convention on Human Rights art 20(3).

6 See Parry's Nationality and Citizenship Laws of the Commonwealth 8-27.

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### **393. Multiple nationality and citizenship.**

One result of the virtually complete liberty of action of states in relation to nationality is that an individual may possess the nationality of more than one state under their respective laws. Although occasional judicial pronouncements may be found to the effect that the common law, or English law, does not countenance multiple nationality<sup>1</sup>, such statements are misconceived and it is clear that the phenomenon must have been perfectly familiar not only to administrative authorities but also to the courts for some centuries<sup>2</sup>. To the extent that the voluntary acquisition of another nationality or citizenship does not result in the loss of British citizenship<sup>3</sup>, the present law of the United Kingdom may be seen as favouring rather than discouraging multiple nationality. Customary international law does not differentiate in any way between the power and jurisdiction of a state over nationals who hold only its nationality and those who are also nationals of another state, although particular provision as to the treatment of dual nationals may be provided for by treaty<sup>4</sup>. Special rules apply as to the extent to which a claim by way of diplomatic protection can be brought on behalf of a dual national against a state of which he is also a national<sup>5</sup>.

1 *Fasbender v A-G, Kramer v A-G* [1922] 2 Ch 850 at 878, CA, per Younger LJ; cf *Kramer v A-G* [1923] AC 528, HL. Compare *Zedtwitz v Sutherland* 26 F 2d 525 at 527 (US Dist CA, DC 1928) per Martin CJ.

2 See eg *Proceedings against Macdonald* (1747) 18 State Tr 857, which disproves the suggestion of Lord Coleridge CJ in *Re Stepney Election Petition, Isaacson v Durant* (1886) 17 QBD 54 at 63, that it cannot be the law that a man 'rightfully and legally in the allegiance of one sovereign could be also rightfully and legally treated as a traitor by another'. See also *Drummond's Case* (1834) 2 Knapp 295, PC.

3 The rule according to which a British citizen who voluntarily acquired another nationality lost British citizenship, originally contained in the Naturalization Act 1870 s 6 and perpetuated by the British Nationality and Status of Aliens Act 1914 (subsequently the Status of Aliens Act 1914) s 13, lapsed with the repeal of those provisions by the British Nationality Act 1948. However, the Secretary of State has power to deprive a person of British citizenship on the ground that it would be conducive to the public good under the British Nationality Act 1981 s 40(2): see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 42-43. Pursuant to s 40(4) such an order may not be made if the Secretary of State is satisfied that the order would make a person stateless (see eg *Al Jedda v Secretary of State for the Home Department* [2008] UKSIAC 66/2008, SIAC); as a consequence, the power of deprivation is normally only applicable to British nationals who also hold the nationality of another state.

4 See eg the International Protocol Relating to Military Obligations in Certain Cases of Double Nationality (The Hague, 12 April 1930; TS 22 (1937); Cmd 5460). Article 1 provides that, where a person with multiple nationalities habitually resides in one of the countries whose nationality he possesses and is in fact most closely connected with that country, he is to be exempt from all military obligations in the other country or countries; however, exemption from military service may result in the loss of nationality. Article 2 provides that, where a dual or multiple national of one of the state parties is entitled under its law to renounce or decline the nationality of that state, he is exempt from carrying out military service for that state during his minority. See also the European Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (Strasbourg, 6 May 1963; TS 88 (1971); Cmd 4802) and the various Protocols thereto.

5 See PARA 401.

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### **394. Nationality of corporations.**

Corporations are essentially a creation of municipal law, and as such, international law has to recognise the institutions created by the municipal law of states in an area which remains essentially within their domestic jurisdiction<sup>1</sup>. Accordingly, whenever questions arise as to the rights of corporate entities and their shareholders as to which international law lays down no specific rules, it is necessary for international law to have regard to the relevant rules of municipal law<sup>2</sup>. Although international law contains no rules of its own relating to the creation, management and dissolution of corporations, nevertheless it governs which state is to be regarded as the national state of a corporation for the purposes of identifying which state may exercise diplomatic protection on its behalf in relation to an injury inflicted upon it by another state in violation of international law<sup>3</sup>. As a matter of English law, unlike other systems<sup>4</sup>, the attribution of nationality to a body corporate is unnecessary, whether in relation to jurisdiction, taxation or for any other purpose. The rules relating to trading with an enemy provide no exception, although the 'commercial domicile' test of enemy character, by which incorporation in an enemy state creates an irrefutable presumption<sup>5</sup>, is sometimes referred to as one of national character<sup>6</sup>. The United Kingdom has entered into numerous treaties stipulating reciprocal recognition of entities incorporated under the laws of the contracting states<sup>7</sup>, but these provisions are strictly superfluous from the point of view of English law, since it is well established that a foreign-incorporated corporation may sue and be sued in the courts<sup>8</sup>. These provisions, furthermore, imply no necessary acceptance of the view that the nationality of a corporation is determined exclusively or at all by the place of incorporation. Other treaty provisions referring explicitly to 'nationals' of this or that state have upon occasion fallen to be considered by the courts in relation to their application to corporations, and it has been held that although the term 'nationality' can only be used in regard to corporate bodies 'by a figure of speech', nevertheless it must necessarily be only too plain that a corporate body, which owes its very existence to the laws of a particular country and which has its principal place of business in that particular country, must be treated as a national of that country<sup>9</sup>.

1 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 33 (para 38).

2 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 33-34 (para 38); *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (para 61) (international law has regard to municipal law in relation to whether a corporation possesses independent and distinct legal personality).

3 See the Articles on Diplomatic Protection ('ADP') Commentary to Article 9, para (3), Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV. As to which state is to be regarded as constituting the state of nationality of a corporation for the purposes of diplomatic protection see PARA 402.

4 For an authoritative discussion of the development of the notion of nationality or quasi-nationality of corporations in other legal systems see the Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law 1927, 22 American Journal of International Law, Official Documents, 172. See also Parry's Nationality and Citizenship Laws of the Commonwealth 133-142.

5 *McNair and Watts Legal Effects of War* (4th Edn) 102, 236. There is apparently only obiter judicial authority for this rule: see *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484 at 490, HL, per Lord Halsbury LC, at 497 per Lord Macnaghten, at 498 per Lord Davey, at 501 per Lord Brampton, and at 505 per Lord Lindley. For the proposition that bare incorporation in an enemy state fixes a company with enemy character see *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307 at 342, HL, per Lord Parker; and

**WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 575. See also the Trading with the Enemy Act 1939 s 2(1)(d); and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 577.

6 See McNair 'National Character and Status of Corporations' (1923-1924) 4 BYIL 44. In so far as the general test of enemy character is territorial (ie commercial domicile) rather than personal, the usage is justifiable.

7 See eg 'Companies and Associations', Handbook of Commercial Treaties (4th Edn) 1103-1104.

8 As to actions by or against foreign companies see **COMPANIES** vol 15 (2009) PARA 1837 et seq. See also *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114, [1991] 1 All ER 871, HL, where it was held that recognition should be given to the right to sue and be sued in the English courts of an international organisation created by a group of foreign states and which had been recognised as a corporate body having separate legal personality under the laws of one of those foreign states which was recognised by the United Kingdom.

9 *Bohemian Union Bank v Administrator of Austrian Property* [1927] 2 Ch 175 at 180, 195 per Clauson J with reference to the expression 'Nationality of an Allied or Associated Power' in the Treaty of St Germain (Treaty for the Protection of Minorities) (St Germain, 10 September 1919; TS 20 (1919); Cmd 223) art 249(b). See also *Assicurazioni Generali v Selim Cotran* [1932] AC 268, PC, decided with reference to a similar expression in the Treaty of Peace with Turkey (Treaty of Lausanne) (Lausanne, 24 July 1923; TS 16 (1923); Cmd 1929). Bilateral investment treaties normally define the classes of legal persons which qualify as investors and therefore enjoy substantive protection under the treaty by reference to their place of incorporation, although other requirements may also be stipulated; under the provisions of some bilateral investment treaties, the class of protected investors may include corporations incorporated in any state (including the host state), but which are controlled by natural or legal persons of the investor state.

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### 395. Nationality of ships.

International law lays down no general rules concerning which ship is to be treated as belonging to which state, but leaves the rules in this regard to municipal law<sup>1</sup>. However, pursuant to international convention, every state must fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag<sup>2</sup>. A ship must have the nationality of the state whose flag it is entitled to fly<sup>3</sup>. There must exist a genuine link between the state and the ship<sup>4</sup>. Each state must issue to ships to which it has granted the right to fly its flag documents to that effect<sup>5</sup>.

1 See Rienow *The Test of the Nationality of a Merchant Vessel, Comparative Study of National Laws Governing the Right to Fly a Merchant Flag* (UN 1955). See also *Muscat Dhows Arbitration* 11 RIAA 83 (1905). This is perhaps a reflection of the general rule as regards the grant of nationality to individuals: see PARA 392.

2 For the conditions governing the granting of nationality and the registration of British merchant ships see the Merchant Shipping Act 1995 Pts I, II (ss 1-23); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 245 et seq.

3 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) art 91(1). The Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958; TS 39 (1966); Cmnd 3028) art 14 defines 'nationals' as ships having the nationality of the state concerned irrespective of the nationalities of the crew members. A ship without nationality lacks a state to protect it, although it is not outside the application of domestic laws: see *Naim Molvan (Owner of Motor Vessel Asya) v A-G for Palestine* [1948] AC 351, PC. As to the nationality of pirate ships see PARA 158.

4 United Nations Convention on the Law of the Sea art 91(1). The requirement of a 'genuine link' is founded upon the judgment of the International Court of Justice in *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* ICJ Reports 1955, 4. It appears to be directed against ships using so called 'flags of convenience', such as those flown by ships registered in Panama, Liberia and Honduras (as to which see Boczek's *Flags of Convenience*): see also PARA 396. However, the court disregarded any requirement of a genuine link in relation to the question whether such states were ship-owning states and in ascertaining the extent of the tonnage sailing under their flags for the purpose of determining whether the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation was properly constituted, treating the matter as solely one concerning the constituent instrument creating that organisation: see *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation (Advisory Opinion)* ICJ Reports 1960, 150.

5 United Nations Convention on the Law of the Sea art 91(2). As to the duties of the flag state with respect to its ships see the United Nations Convention on the Law of the Sea art 94; and PARA 152.

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**396. Changes of flag; ships sailing under two or more flags.**

A ship may sail under the flag of one state only and, save in exceptional cases expressly provided for in the United Nations Convention on the Law of the Sea<sup>1</sup> or other international treaties, is subject to its exclusive jurisdiction on the high seas<sup>2</sup>. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry<sup>3</sup>. A ship which sails under the flags of two or more states, using them according to convenience, may not claim any of the nationalities in question with respect to any other state, and may be assimilated to a ship without nationality<sup>4</sup>.

1 The United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524).

2 United Nations Convention on the Law of the Sea art 92(1). Under some multilateral conventions, a state may also be positively required to establish its jurisdiction over particular offences committed on board a ship flying its flag: see eg the International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997) art 6(1)(b); and the International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005; Misc 9 (2007); Cm 7301) art 9(1)(b). See further PARA 138. As to the circumstances in which a state other than the flag state may assume jurisdiction over a ship on the high seas see PARA 148.

3 United Nations Convention on the Law of the Sea art 92(1).

4 United Nations Convention on the Law of the Sea art 92(2). As to ships without nationality see PARA 395 note 3. The provisions of art 91 (see PARA 395) and art 92 of the United Nations Convention on the Law of the Sea are without prejudice to the question of ships employed on the official service of the United Nations, its specialised agencies or the International Atomic Energy Authority flying the flag of the organisation: art 93.



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### **397. Nationality of aircraft.**

Pursuant to the Convention on International Civil Aviation<sup>1</sup> an aircraft has the nationality of the state in which it is registered<sup>2</sup>. It may not be registered in more than one state, although registration may be changed from one state to another<sup>3</sup>. Registration and transfer of registration of aircraft in any contracting state must take place in accordance with that state's regulations and laws<sup>4</sup>.

1 The Convention on International Civil Aviation (Chicago, 7 December 1944; TS 8 (1953); Cmd 8742). As to the Chicago Convention see **AIR LAW** vol 2 (2008) PARA 2 et seq.

2 Convention on International Civil Aviation art 17.

3 Convention on International Civil Aviation art 18. For further consideration of these provisions and of the relevant law of the United Kingdom see **AIR LAW** vol 2 (2008) PARA 358. The state of registration has jurisdiction over offences on board: Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963; TS 126 (1969); Cmd 4230) art 3(1); see PARAS 199-202. It may also be positively required by treaty to establish its jurisdiction over particular offences committed on board an aircraft registered under its laws: see eg the International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997) art 6(1)(b); and the International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005; Misc 9 (2007); Cm 7301) art 9(1)(b). With respect to joint operating organisations see the Convention on International Civil Aviation arts 77-79; Resolutions of the Council of the International Civil Aviation Organisation; 9 Whiteman's Digest 383-390.

4 Convention on International Civil Aviation art 19.

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### **C. NATIONALITY OF CLAIMS**

#### **398. Nationality of claims: the general rule.**

In order to be able to take up by way of diplomatic protection a claim which arises out of an injury committed in relation to an individual person or corporation, a state must normally be in a position to demonstrate that the injured person or corporation possesses its nationality<sup>1</sup>. This rule is one of the consequences of the historical conception of diplomatic protection, namely that, in presenting an international claim which arises from an injury to an individual, the state is asserting its own rights and is claiming for an injury to itself, suffered through the injured person<sup>2</sup>. In order for a state to take up a claim, a legal right of the injured person must have been infringed by the respondent state; it is insufficient that a mere interest which is unprotected by law has been affected<sup>3</sup>. It appears that diplomatic protection cannot be exercised on behalf of stateless individuals<sup>4</sup>.

1 See eg *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports, 19 December 2005 (para 333) (individuals); *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (para 40) (individuals), (para 61) (corporations). For older decisions holding that states are not permitted to take up claims of persons other than their own nationals see *Orazio de Attellis* (1839) Moore Int Arb 3333; *Administrative Decision No V (United States v Germany)* 7 RIAA 119 at 141 (1924). Exceptionally, a state may be able to bring a claim on behalf of a protected person: *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 647 (1925). Further, it appears that a state may be able to bring a claim on behalf of a non-national seaman serving on a ship flying its flag, although such a claim probably does not constitute diplomatic protection as such: see PARA 403. In general the United Kingdom government will not take up a claim unless the claimant is a United Kingdom national: Foreign and Commonwealth Office, Rules Applying to International Claims 1985 r 1, and comment para (b) (reproduced in 37 ICLQ 1006 (1988)). This term includes persons who fall into one of the following categories under the British Nationality Act 1981 (or one of the corresponding categories under earlier legislation): (1) British citizens; (2) British overseas territories citizens; (3) British overseas citizens; (4) British subjects under Pt IV (ss 30-35); and (5) British protected persons. See further **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 5 et seq. The term also includes companies incorporated under the law of the United Kingdom or of any territory for which the United Kingdom is internationally responsible. As to the nationality of individuals in international law see PARA 392. As to the nationality of corporations in international law see PARA 394. As to claims on behalf of corporations and their members see PARA 402. Under some treaties in the field of international human rights law, a state may be entitled to complain of a breach committed in relation to any person, including a person not having its nationality: see eg the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the 'European Convention on Human Rights') art 33 (as amended by Protocol 11). See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 172.

2 *Mavrommatis Palestine Concessions* PCIJ Ser A No 2 (1924); *Panevezys-Saldutiskis Railway (Estonia v Lithuania)* PCIJ Ser A/B No 76 (1939); *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 46. See also *Factory at Chorzów* PCIJ Ser A No 17 (1928); *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* ICJ Reports 1949, 174. As to the nature of diplomatic protection see PARA 386.

3 *Factory at Chorzów* PCIJ Ser A No 17 (1928); *Interhandel (Switzerland v United States of America) (Preliminary Objections)* ICJ Reports 1959, 6 at 27; *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 36 (para 46). Accordingly, a state cannot bring a claim where an internationally wrongful act has affected the interests of one of its nationals as a shareholder of a corporation, rather than actually affecting that national's rights. As to the extent to which claims may be brought on behalf of shareholders see PARA 402. Further, it has been held that a creditor has no legal interest arising directly out of an injury to his debtor: *McNear* 4 RIAA 373 (1928); *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 730 (1925); *Forests of Central Rhodope* 3 RIAA 1405 at 1425 (1933); *Dickson Car Wheel Co* 4 RIAA 669 at

679 (1931); *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 35 (para 44). With respect to mortgages see *Tlahualilo* Foreign Relations of the United States (1913) 931; 5 Hackworth's Digest 848. As to insurance claims see 1 O'Connell's International Law (2nd Edn) 1050.

4 See *Dickson Car Wheel Co* 4 RIAA 669 at 678 (1931). However, to the extent that this decision suggests that a state does not commit an internationally wrongful act in inflicting an injury upon a stateless person and that no state is entitled to intervene on his behalf, it has clearly been overtaken by the evolution in international law, in particular the emergence of international human rights law.

The International Law Commission ('ILC') has proposed, expressly *de lege ferenda*, that, by way of exception to the normal requirement of nationality, a state should be able to exercise diplomatic protection in relation to stateless persons and refugees who were lawfully and habitually resident at the date of injury and at the date of the claim: see the Articles on Diplomatic Protection ('ADP') art 8, Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV; and PARA 391 note 1. However, it has been held that the proposed rule does not represent customary international law: see *R (on the application of Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs (United Nations High Commissioner for Refugees intervening)* [2006] EWCA Civ 1279, [2008] QB 289, [2006] All ER (D) 138 (Oct).

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### 399. Continuous nationality.

In general, and in the absence of any express treaty stipulation to the contrary, in order for a state to take up a claim arising out of an injury to an individual or corporation, that individual or corporation must have possessed the nationality of that state at the time of the injury<sup>1</sup> and continuously thereafter up to the date of the presentation of the claim<sup>2</sup>. Thus a claim may not normally be presented where the injured person has changed his nationality since the date of the injury<sup>3</sup>, or where the claim has changed its nationality, as where the injured national has died and his heirs do not possess the same nationality or, if they do, possess also the nationality of the state responsible for the injury<sup>4</sup>. The same may be the case when the injured person has assigned his rights to a national of another state<sup>5</sup>. It has been suggested that a state may not continue to exercise diplomatic protection in respect of a natural or legal person who acquires the nationality of the state against which the claim is brought after the date of the official presentation of the claim<sup>6</sup>.

1 *Panevezys-Saldutiskis Railway (Estonia v Lithuania)* PCIJ Ser A/B No 76 at 16-17 (1939); *Forests of Central Rhodope* 3 RIAA 1405 at 1421 (1933); *Corvaia* 10 RIAA 609 (1903); *Gleadell* 5 RIAA 44 at 49 (1929); Rules Applying to International Claims 1985 r I, and comment (reproduced in 37 ICLQ 1006 (1988)). As to the practice of the Foreign Claims Settlement Commission see Lillich *International Claims: Post War British Practice* 24-31.

The International Law Commission ('ILC') has proposed that a claim may be made by a state in relation to an individual who is a national at the date of the presentation of the claim but was not a national at the date of the injury, provided that the individual either had the nationality of a predecessor state at the date of the injury and as a result of the law of state succession had acquired the nationality of the new state, or had lost the previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the claiming state in a manner not inconsistent with international law: see the Articles on Diplomatic Protection ('ADP') art 5(2), Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV. Even in such circumstances, however, diplomatic protection may not be exercised by the new state of nationality against a former state of nationality for an injury caused when the individual was a national of the former state of nationality but not of the new state of nationality: see ADP art 5(3).

2 This is the approach taken in ADP art 5(1) (natural persons) and art 10(1) (corporations), which require continuous nationality from the date of injury up to the date of presentation of the claim. However, the ILC has made clear that, given the lack of clarity of state practice as to the requirement of continuous nationality for the period between injury and presentation and claim, this is a progressive development of the law; the requirement of continuity of nationality between injury and claim is included expressly on the basis that there exists a rebuttable presumption of continuity if nationality is proved to have existed at both the date of injury and the date of presentation of the claim: see ADP, Commentary to Article 5, para (2), Commentary to Article 10, para (2). It is also the position taken by the United Kingdom, which likewise takes the position that in practice it is normally sufficient to prove nationality at the date of injury and at the date of presentation of the claim: see the Rules Applying to International Claims 1985 r I and comment (reproduced in 37 ICLQ 1006 (1988)). Some international decisions have taken a different approach as to the precise date up to which the victim of the violation is required to possess the nationality of the claimant state: in *The Loewen Group, Inc and Raymond L Loewen v United States of America* ICSID Case No ARB(AF)/98/3, Award of 26 June, (2003) 7 ICSID Reports 442, an arbitral tribunal, in relation to a claim of violation of the North American Free Trade Agreement brought by a corporation which had changed its nationality to that of the respondent state after commencing its claim but prior to the making of the final award, took the view that, under the customary international law of diplomatic protection, nationality had to be continuous not only up to the date of presentation but also up to the time of the resolution of the claim. The ILC has expressly declined to follow the reasoning of that decision as to the date to which nationality has to be continuous, although it accepted that the result was correct in so far as the claimant had subsequently acquired the nationality of the respondent state: see ADP art 5(4), Commentary to Article 5, para (5) (individuals). See also art 10(2) (corporations). Where a corporation was a national at the date of injury but has subsequently ceased to exist under the law of the state of incorporation, the ILC has suggested that that state should nevertheless remain entitled to exercise diplomatic protection on its behalf: see art 10(3).

3 Where the claimant has become or ceases to be a United Kingdom national after the date of the injury, the United Kingdom government may, in an appropriate case, take up his claim in concert with the government of the country of his former or subsequent nationality: Rules Applying to International Claims 1985 r II. Cf the proposal contained in ADP art 5(2) (see note 1); in any case, it is clear that a state may not exercise diplomatic protection on behalf of an individual who acquires its nationality subsequent to the date of an injury if the individual was a national of the responsible state at the time of the injury (see art 5(3); and note 1).

4 See eg *Stevenson* 9 RIAA 494 at 502-506 (1903); *Maninat* 10 RIAA 55 at 76 (1905); *Massiani* 10 RIAA 159 at 183 (1905); *Miliani* 10 RIAA 584 at 591 (1904); *Giacopini* 10 RIAA 594 at 596 (1903); *Poggioli* 10 RIAA 669 at 679 (1903). The ADP, although recognising the impermissibility of a claim where the heirs of the injured person have the nationality of the allegedly responsible state, do not attempt to lay down any rules in relation to the issue of whether a claim may be brought by the state of nationality of the injured person who has died where the heirs have the nationality of a third state: see ADP, Commentary to Article 5, para (14). In the practice of the United Kingdom government, where the claimant has died since the date of the injury to him or his property, his personal representatives may seek to obtain relief or compensation for the injury on behalf of his estate. Such a claim is not to be confused with a claim by a dependant of a deceased person for damages for his death: Rules Applying to International Claims 1985 r XI. Where the personal representatives are of a different nationality from that of the original claimant, the rules would probably be applied as if it were a case of a single claimant who had changed his national status: r XI and comment.

5 This would seem to follow from the principle. However, the right of a state was not regarded as defeated by reason of an assignment in *Administrative Decision No V (United States v Germany)* 7 RIAA 119 at 150 (1924). See also *Landreau* 1 RIAA 347 (1922); *Alsop* 11 RIAA 349 (1911) (assignment to creditors).

6 See ADP arts 5(4), 10(2). The ADP thus reflect the outcome, if not the reasoning, of the decision of the arbitral tribunal in *The Loewen Group, Inc and Raymond L Loewen v United States of America* ICSID Case No ARB(AF)/98/3, Award of 26 June, (2003) 7 ICSID Reports 442: see note 2.

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#### **400. The genuine link.**

It has been held that a state cannot present an international claim on account of an injury to one of its nationals against another state unless the individual in question also has a genuine link or substantial connection with the claimant state<sup>1</sup>. However, that requirement is probably too broadly stated and merely entails that a claimant state cannot present the claim if, although not possessing the nationality of the respondent state, its national in fact has closer links or connections with the latter state than with the former<sup>2</sup>.

<sup>1</sup> *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* ICJ Reports 1955, 4. As to the requirement of a genuine link see also United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmd 4524) art 91(1); and PARA 395. It is not clear whether this applies in the case of a person who has the nationality of the claimant state at birth or in cases of individuals who have that nationality by descent, or whether it only applies (as in *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* ICJ Reports 1955, 4) to persons who have acquired the nationality of the claimant state by naturalisation. Further, it is not clear whether the genuine link principle applies to protection of corporations: see PARA 402. See also *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 42-45, and the separate declarations and opinions at 52, 80-84.

<sup>2</sup> This appears to have been the view taken by the Italian-United States Conciliation Commission in *Flegenheimer* 14 RIAA 327 (1958). See also *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 81. In *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* ICJ Reports 1955, 4, the International Court of Justice merely held that the Liechtenstein nationality acquired by the individual in replacement of his previous German nationality was not in the circumstances of the case opposable to Guatemala, whose nationality he did not possess but with whom he had considerable connections in respect of his domicile and property at the time of the injury complained of. The International Law Commission ('ILC') has likewise taken the view that there is no general requirement of an 'effective' or 'genuine' link with the state exercising diplomatic protection, and interpreted the decision in *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* as limited to its particular facts: see the Articles on Diplomatic Protection ('ADP') Commentary to Article 4, para (5) (individuals), Commentary to Article 9, para (3) (corporations), Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV.

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#### **401. Claims on behalf of individuals having multiple nationality.**

In relation to persons who possess more than one nationality<sup>1</sup>, although at one time it was thought that the state of one of those nationalities could not in general present a claim arising out of an injury to such a person arising out of acts attributable to the state of his other nationality and that rule was embodied in a multilateral treaty provision<sup>2</sup>, the general rule appears to be that a claim can be brought against another state of nationality if the claimant state is the state of dominant nationality at both the time of injury and the date of presentation of the claim<sup>3</sup>. Where a person having multiple nationality is injured by the acts of a state of which he is not a national, it appears that any of the states of which he is a national may present a claim, or they may do so jointly, and there is no rule that only the state of dominant nationality (that is, that with which he has the closest links) or a state with which he had genuine links may bring a claim<sup>4</sup>. When injury has been caused to a national of a state who subsequently dies and whose claim passes to his heirs, some of whom have the nationality of the state which committed the injury, the compensation recoverable from that state will normally have to be scaled down appropriately<sup>5</sup>.

1 See PARA 393.

2 See the International Convention on Certain Questions Relating to the Conflict of Nationality Laws (The Hague, 12 April 1930; TS 33 (1937); Cmd 5553) art 4.

3 This is the approach adopted in the Articles on Diplomatic Protection ('ADP') art 7, Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV. The ADP art 7 takes the view that a state of nationality of an individual may not exercise diplomatic protection against another state of which he has nationality unless the nationality of the claimant state is predominant, both at the date of injury and at the date of presentation of the claim. See also *Carnevaro Case* 11 RIAA 397 (1912); *Mergé* 14 RIAA 236 (1955); and the other cases referred to in ADP, Commentary to Article 7, para (3). The dominant nationality principle has also been applied by the Iran-US Claims Tribunal so as to allow claims by dual nationals: *Esphahanian v Bank Tejarat* 2 Iran-US CTR 157 at 166 (1983); *Case No A/18 5* Iran-US CTR 251 (1984); *Golpira v Government of the Islamic Republic of Iran* 2 Iran-US CTR 174 (1983), 72 ILR 493. The United Kingdom government will not normally take up the claim of a dual national as a United Kingdom national if the respondent state is the state of his second nationality; it may do so, however, if in the circumstances which gave rise to the injury the respondent state has treated the claimant as a United Kingdom national: Rules Applying to International Claims 1985, r III (reproduced in 37 ICLQ 1006 (1988)). See also 5 British Digest 382-384; British Practice in International Law 1964 (I) 60. For the practice of the Foreign Compensation Commission see Lillich *International Claims: Post War British Practice* 32-34.

4 See ADP art 6; and the cases cited in the Commentary to Article 6. See in particular *Salem Case* 2 RIAA 1161 (1932); *Flegenheimer* 14 RIAA 327 (1958); *Dallal v Iran* (1983) 3 Iran-US CTR 23. In *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 50, the International Court of Justice did not exclude the possibility of concurrent claims being made on behalf of persons having dual nationality, although it was thought that in such a case the lack of a genuine link with one of the states might be set up by the respondent state against the right of the former state to present the claim. As to the postulated requirement of a genuine link see PARA 400. See also the International Convention on Certain Questions relating to the Conflict of Nationality Laws art 5. In this type of case, the United Kingdom government may take up the claim alone, but will usually prefer to do so jointly with the other government entitled to do so: Rules Applying to International Claims 1985 r III.

5 See PARA 399.

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#### **402. Claims for injuries to corporations and shareholders.**

As a general rule, under international law, a state may take up by way of diplomatic protection a claim which arises out of an injury committed against a corporation or other juridical person which possesses its nationality<sup>1</sup>. For the purposes of diplomatic protection, what is important from the point of view of international law is whether a corporation is granted separate legal personality independent of its members, which implies that it has been granted rights over its own property, which it alone is capable of protecting<sup>2</sup>; as a result, only the state of nationality of a corporation may exercise diplomatic protection on its behalf when its rights are injured by an internationally wrongful act of another state<sup>3</sup>. As concerns the question of whether a corporation has separate legal personality, international law has regard to the rules of municipal law<sup>4</sup>. Traditionally international law regarded the right to exercise diplomatic protection of a company as appertaining to the state under the laws of which it was incorporated and in whose territory it had its registered offices; however, some states have only been willing to exercise diplomatic protection where the seat or management or centre of control was also located in its territory, or where a majority of the shares in the corporation were owned by nationals, such as to provide a genuine connection or genuine link with that state<sup>5</sup>. In that regard, it would appear that there is no clear settled rule which is generally accepted requiring a 'genuine connection' between the corporation and the state<sup>6</sup>. Accordingly, the state of incorporation will normally constitute the state of nationality of a corporation for the purposes of the exercise of diplomatic protection<sup>7</sup>, although there may exist some additional requirement that there be a 'close and permanent connection' with the state purporting to exercise diplomatic protection<sup>8</sup>. It has been proposed that although the national state entitled to exercise diplomatic protection on behalf of a company is normally the state in which the company is incorporated, by way of exception, where the corporation is controlled by nationals of another state or states and has no substantial business activities in the state of incorporation and the seat of management and the financial control of the corporation are both located in another state, that state should be regarded as the state of nationality<sup>9</sup>. In the practice of the United Kingdom the requirement as to nationality is taken to mean a corporation which is created and regulated under the law of the United Kingdom or any territory for which it is internationally responsible<sup>10</sup>. In general a state may not take up a claim arising out of an injury to a foreign corporation, nor may it do so on behalf of the members or shareholders of any such corporation who happen to possess its nationality<sup>11</sup>. It is not clear whether a state may present a claim on behalf of a foreign corporation, or members or shareholders having its own nationality, when the corporation suffered the injury at the hands of the state of which it is a national<sup>12</sup>. In either event, however, a state may take up a claim for an injury to its nationals who are members of a foreign corporation when that injury was inflicted not upon the corporation itself, but against the members directly<sup>13</sup>.

1 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 42 (para 70), 48 (para 93); *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (para 61). As to the nationality of corporations see PARA 394.

2 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (para 61). As to separate legal personality of companies see further **COMPANIES** vol 14 (2009) PARA 120 et seq.



3 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (para 61). Rules similar to those applicable to corporations would appear to apply, mutatis mutandis, to other legal persons: see the Articles on Diplomatic Protection ('ADP') art 13, Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV.

4 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (para 61).

5 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 42 (para 70). In this case the International Court of Justice did not have to take a firm position in this regard given the very strong links of the company in question with Canada and that it had not been disputed by any of the states involved that Canada was the national state: *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 42-45. As to the requirement of a 'genuine link' in relation to nationality of individuals see PARA 400. As to state practice requiring some connection other than mere incorporation see Beckett, 17 Transactions of the Grotius Society 175 at 177 note (f); White's Nationalisation of Foreign Property 62-63. It has been argued that there is little if any evidence that a state may present an international claim on behalf of a corporation on the mere ground that it is incorporated under its laws: Parry's Nationality and Citizenship Laws of the Commonwealth 139. For the British practice, which appears to bear this out, see 5 British Digest 503-573 (especially the Report of the Inter-Departmental Committee dated 29 April 1913 set out at 527-535). In British practice, each case has been dealt with in the light of its own facts: see *Enrique Cortes & Co* (1896) 5 British Digest 514 (where the United Kingdom government refused to take up the claim); *Santa Clara Estates Co Ltd* (1903) 5 British Digest 518, 9 RIAA 455 (1903) (where the claim was taken up and subsequently allowed). In determining whether to exercise its right of protection, the United Kingdom government may consider whether the company has in fact a real and substantial connection with the United Kingdom: Rules Applying to International Claims 1985 r IV, and comment (reproduced in 37 ICLQ 1006 (1988)). For the practice of the United States see 5 Hackworth's Digest 839. In *The 'I'm Alone'* 3 RIAA 1609 (1935), although a breach of international law was found, no damages were awarded in respect of injury to a company whose members were almost all nationals of the respondent state.

6 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 42 (para 70); and see also the separate declarations and opinions at 52, 80-84.

7 See ADP art 9; and see also Commentary to Article 9, para (3), which observes that as a matter of most systems of domestic law, a corporation incorporated under the law of the state must have its registered office within that state.

8 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 42 (para 71).

9 ADP art 9. The Commentary makes clear that it is envisaged that where the seat of management and financial control of the corporation are located in different states, the national state remains the state of incorporation: ADP, Commentary to Article 9, para (6).

10 Rules Applying to International Claims 1985 r IV. See also r I para (b).

11 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 (claim by Belgium on behalf of Belgian members of a Canadian company allegedly injured by Spain). When a United Kingdom national has an interest as a shareholder or otherwise in a company incorporated in another state, and that company is injured by the acts of a third state, the United Kingdom government will normally take up his claim only in concert with the government of the state in which the company is incorporated. Exceptionally, as for example, where the company is defunct, there may be independent intervention: Rules Applying to International Claims 1985 r V. However, a right to exercise diplomatic protection in such circumstances is not clear as a matter of customary international law. In *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 41 (para 66), the International Court of Justice stated that the term 'practically defunct' lacks all legal precision. The court suggested that two types of special circumstances might justify 'lifting the veil' of incorporation: (1) cases of enemy property in war; and (2) specific agreements on nationalisation of property (although the court appeared to regard these as *sui generis*). See also *Standard Oil Co (Romano-Americana)* 5 Hackworth's Digest 840. In *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15, the United States brought a claim before the International Court of Justice for injuries to the Italian subsidiaries of an American company without objection from either Italy or the Chamber of the Court; however, the claim was brought on the basis of violation of the provisions of a bilateral treaty.

12 In *Delagoa Bay Railway Co* (1893) 5 British Digest 535, such a claim was successfully presented by the governments of Great Britain and the United States, but for the purposes of the arbitration, which was only concerned with the assessment of compensation, the government of the respondent state, Portugal, had conceded the locus standi of the former states. See also Correspondence with the Mexican government regarding the Expropriation of Oil Properties in Mexico (Cmd 5758) (1938) (concerning the Mexican Eagle Oil Company). The United Kingdom government has stated that where a United Kingdom national has an interest

as a shareholder or otherwise in a company incorporated in another state, and of which it is therefore a national, and that state injures the company, the United Kingdom government may intervene to protect the interests of that United Kingdom national: Rules Relating to International Claims 1985 r VI. Where the capital in a foreign company is owned in various proportions by nationals of several states, including the United Kingdom, it is unusual for the United Kingdom government to make representations unless the states whose nationals hold the bulk of the capital will support them in making representations: comment to r VI. Although the practice of the Foreign Compensation Commission has been to allow such claims (Lillich *International Claims: Post War British Practice* 42), that practice depends upon the compensation agreements and the orders made under the Foreign Compensation Acts (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 803 et seq). The United States government declined to intervene in *Antioquia* (1866) 6 Moore's Digest 644, although it obtained compensation in *El Triunfo* 15 RIAA 455 at 464 (1902). However, this may be a case of direct interference with the members' rights: see note 13. The claimant state succeeded also on this point in *British Claims in the Spanish Zone of Morocco* RIAA 615 at 729 (1925), *Shufeldt* 2 RIAA 1079 (1930), and *Alsop* 11 RIAA 349 (1911), although the first two of these were arguably partnerships and the third was decided not by an arbitrator but by an amiable compositeur. Claims on behalf of members of foreign corporations injured by the state of incorporation were denied in *Brewer, Moller & Co* 10 RIAA 433 (1903); *Baasch and Römer* 10 RIAA 723 (1903); and *Henriquez* 10 RIAA 713 at 727 (1903). The International Court of Justice in *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 48 (para 92) expressed no settled view one way or another, and stated only that the situation of a state of nationality of shareholders bringing a claim against the state of incorporation of a company had no application to the facts of the case before the court 'whatever the validity of this theory may be'. Judges Fitzmaurice (at 72-74), Tanaka (at 134) and Jessup (at 191-193) were in favour of permitting the state of the nationality of the members to take up their claim in such a situation; Judges Morelli (at 240), Padilla Nervo (at 257-259) and Ammoun (at 318) were against. The ILC has proposed that the state of nationality of shareholders in a corporation should not be able to exercise diplomatic protection in respect of those shareholders in relation to an injury to the corporation unless either the corporation has ceased to exist according to the law of the state of incorporation for a reason unrelated to the injury (see ADP art 11(a)), or the corporation, at the date of the injury, had the nationality of the state allegedly responsible for causing the injury and incorporation in that state was required as a precondition for doing business there (see art 11(b)). In *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007, the applicant state claimed exceptionally to be able to exercise diplomatic protection on behalf of its national who was a shareholder in corporations incorporated under the law of the respondent state 'by way of substitution'; the court held that no such exception permitting the exercise of diplomatic protection existed as matter of customary international law (para 89), but did not find it necessary to express any view as to whether there existed a narrower exception reflecting the second hypothesis proposed by ADP art 11(b) such that diplomatic protection might be exercised by the state of nationality of a shareholder if the corporation in which the shares were held was incorporated in the state alleged to have caused the injury and incorporation had been required as a precondition of it doing business there; it held that, on the facts, the corporations did not fall within the scope of any such protection: *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (paras 91-93).

13 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 36. According to the court, the separate rights of the shareholders include the right to any declared dividend, the right to attend and vote at meetings and the right to share in the residual assets of the corporation on liquidation. See also *Baasch and Römer* 10 RIAA 723 (1903) (claims allowed in respect of Dutch interests in Venezuelan companies injured by Venezuela when the companies were extinguished); *Kunhardt & Co* 9 RIAA 171 (1903). The possibility of a claim in relation to direct injury to the rights of a national who was a shareholder in a company was also expressly recognised by the International Court of Justice in *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007, in the context of its examination of the admissibility of that part of the claim alleging infringement of the rights of the individual national of the applicant state who was a shareholder of a corporation incorporated under the law of the respondent state. The court emphasised that, in so far as such a claim seeks to engage the responsibility of another state for an injury caused to a national by an internationally wrongful act committed by that state, it is no more than the exercise of diplomatic protection on behalf of that national; in such circumstances, the conduct amounting to an internationally wrongful act is the violation by the respondent state of the shareholder's direct rights in relation to the corporation; the court stressed that such a claim was not to be regarded as an exception to the general legal regime of diplomatic protection for natural or legal persons under customary international law (para 64). The court left the question of what rights of the shareholder in the corporation might have been affected by the actions of the respondent state for the merits phase (para 66).

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#### **403. Claims on behalf of the crews of ships.**

It would seem that, by way of exception to the general requirement of nationality<sup>1</sup>, the state of nationality or flag state of a ship<sup>2</sup> may seek redress on behalf of crew members of the ship, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act<sup>3</sup>. This possibility is without prejudice to the right of the state of nationality of the crew members to exercise diplomatic protection on their behalf<sup>4</sup>.

1 As to the nationality requirement see PARA 391 et seq.

2 As to nationality of ships see PARAS 395-396.

3 See *The M/V 'Saiga' (No 2)* (*Saint Vincent and the Grenadines v Guinea*) ITLOS Reports 1999, 10, 120 ILR 143. For earlier decisions see eg *McCready* (1868) III Moore Int Arb 2536; and *The 'I'm Alone'* 3 RIAA 1609 (1935) (a decision of a conciliation commission). See also *Reparation for Injuries Suffered in the Service of the United Nations* ICJ Reports 1949, 174 at 202-203 (Dissenting Opinion of Judge Hackworth), and 206-207 (Dissenting Opinion of Judge Badawi Pasha); and Watts 'The Protection of Alien Seamen' (1958) 7 ICLQ 691. The International Law Commission has endorsed the existence of the exception: see the Articles on Diplomatic Protection ('ADP') art 18, Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV. The ILC has taken the position that although the possibility for the state of nationality of a ship (flag state) to claim redress on behalf of crew members of the ship does not as such constitute diplomatic protection given the lack of any bond of nationality between the foreign crew-members and the state of nationality of the ship, there is a very close resemblance: see ADP, Commentary to Article 18, para (1).

4 See ADP art 18.

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**404. Claims presented by international organisations by way of functional protection.**

Where an individual is injured in the course of service with an international organisation, the right to present a claim by way of functional protection which is possessed by that organisation is parallel to the right to do so which is possessed by his state of nationality<sup>1</sup>.

<sup>1</sup> *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* ICJ Reports 1949, 174 at 185.

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### (iii) Exhaustion of Local Remedies

#### 405. Exhaustion of local remedies.

As a general rule, a state may not take up the claim of one of its nationals against another state by way of diplomatic protection until such time as the injured person has exhausted all effective and available local remedies<sup>1</sup>. For these purposes, local remedies include all the legal remedies which are open to the injured person before the judicial or administrative courts or other bodies in the state alleged to have caused the injury<sup>2</sup>. Unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings, administrative remedies are only relevant for the purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour<sup>3</sup>. There is normally no requirement to pursue a remedy which consists of making a request to the executive to exercise powers which are purely discretionary or by way of grace<sup>4</sup>. The claimant must pursue his action by way of appeal up to the highest tribunal<sup>5</sup>, and must employ all the procedural steps which are essential to the vindication of his rights of action<sup>6</sup>. The individual must have raised before the domestic authorities the arguments which form the essence of the claim brought before the international forum<sup>7</sup>. As regards the distribution of the burden of proof, it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies<sup>8</sup>. By contrast, it is for the respondent to show that there were effective remedies available in its domestic legal system that were not exhausted<sup>9</sup>. In deciding whether local remedies have been exhausted, the allegations of fact and law advanced in the claim are normally assumed to be correct<sup>10</sup>.

1 *Panevezys-Saldutiskis Railway (Estonia v Lithuania)* PCIJ Ser A/B No 76 (1939); *Interhandel (Switzerland v United States of America) (Preliminary Objections)* ICJ Reports 1959, 6 (in particular at 27, 83, 88 where the rationale of the rule is explained). See also the International Law Commission ('ILC') Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 44, International Law Commission Report, 53rd Session, A/56/10, YILC 2001, vol II(2); and PARA 330. See further the Articles on Diplomatic Protection ('ADP') art 14, Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV.

The rule has been described as being 'a well-established rule of customary international law': *Interhandel (Switzerland v United States of America) (Preliminary Objections)* ICJ Reports 1959, 6 at 27. See also *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15 at 42 ('an important principle of customary international law'); *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (para 44). See generally Amerasinghe *Local Remedies in International Law* (2004, 2nd Edn).

The United Kingdom government will not normally take over and formally espouse the claim of a United Kingdom national unless all the legal remedies available to him have been exhausted: Rules Applying to International Claims 1985 r VII (reproduced in 37 ICLQ 1006 (1988)). Many international claims have been rejected by arbitral tribunals on this ground: see Borchard's *Diplomatic Protection of Citizens Abroad* 819 n 1.

The rule is also incorporated as a condition of the admissibility of individual applications under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the 'European Convention on Human Rights') art 35(1) (as amended by Protocol 11), as well as constituting a precondition for the right of individual petition under other international instruments for the protection of human rights (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 173 et seq).

As to the nationality of claims rule see PARA 398 et seq.

2 Cf ADP art 14(2).

3 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (para 47).

4 *Finnish Shipowners* 3 RIAA 1479 (1934). Accordingly, there is normally no requirement to make a request for clemency: cf *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 63-66 (paras 135-143).

5 *Electricity Co of Sofia and Bulgaria* PCIJ Ser A/B No 77 (1939). This does not apply where an appeal would be incapable of providing effective redress: see PARA 407. An application to a court for a re-opening of the case is a remedy for the purpose of the rule: *Interhandel (Switzerland v United States of America) (Preliminary Objections)* ICJ Reports 1959, 6 (certiorari to United States Supreme Court). In *Salem Case* 2 RIAA 1161 (1932) it was held that a litigant need not resort to an extraordinary remedy by way of appeal to a court outside the regular legal system.

6 *Ambatielos Claim* 12 RIAA 83 (1956) where it was held that it is the whole system of legal protection as provided by municipal law which must have been put to the test before a state can prosecute the claim at the international level. The plaintiff had failed to call a witness at first instance, and the Court of Appeal had refused him leave to call the witness later. It was held that he had failed to exhaust the remedies available, since he had rendered an appeal futile. See also *Electricity Co of Sofia and Bulgaria* PCIJ Ser A/B No 77 (1939).

7 The requirement that the individual should have raised the essence of the complaint was endorsed by the ILC: see ADP art 14; and Commentary to Article 14, para (6). This is in preference to the stricter test enunciated in some earlier decisions to the effect that all contentions of fact and propositions of law relied upon in the international proceedings had to have been investigated and adjudicated upon by the municipal courts (see eg *Finnish Shipowners* 3 RIAA 1479 at 1502 (1934); *SS Lisman* 3 RIAA 1767 at 1790 (1937)).

8 *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15 at 43-44 (para 53); *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (para 44).

9 *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15 at 46 (para 59).

10 *Ambatielos Claim* 12 RIAA 83 (1956).

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#### **406. Cases to which the rule is not applicable.**

The exhaustion of local remedies rule<sup>1</sup> has no application in cases where the essential basis of the claim by a state is one of direct injury to it caused by the acts of another state, and not a claim relating to treatment of its national<sup>2</sup>. It has also been suggested that where an injury is caused to a national of the claimant state, the rule does not apply unless there is some voluntary link between the national and the defendant state<sup>3</sup>. The rule may be waived or modified by agreement<sup>4</sup>.

1 As to the exhaustion of local remedies rule see PARA 405.

2 As to the distinction between claims for direct injury and claims by way of diplomatic protection see PARA 387. To the extent that a particular claim may be regarded as being both a direct claim and a claim by way of diplomatic protection, it may not be necessary to exhaust local remedies: see eg *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 36 (para 40).

3 Eg this was argued by Israel in *Aerial Incident of 27 July 1955 (Israel v Bulgaria) (Preliminary Objections)* ICJ Reports 1959, 127 at 531-532. The court did not deal with the point. If this is so, the rule would not apply in cases such as an injury to an alien present in a state through force majeure, or the sinking of a merchant ship by a warship on the high seas.

The International Law Commission ('ILC') has suggested that there is a requirement that there should be some 'relevant connection' between the injured person and the state alleged to be responsible at the date of the injury, on the basis that in the absence of such a link it would be unreasonable, unfair or cause great hardship to require exhaustion, albeit that it expressly recognised that there is no judicial authority or state practice which provides clear guidance on the existence of such a requirement: see the Articles on Diplomatic Protection ('ADP') art 15(c), Commentary to Article 15, paras (7)-(10), Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV.

4 The rule has been excluded or modified in various international treaties providing for mechanisms for the settlement of particular claims: eg it was excluded in the Convention for the Settlement of British Pecuniary Claims in Mexico Arising from Loss or Damage from Revolutionary Acts (Mexico City, 19 November 1926; TS 11 (1928); Cmd 3085) art 6, 5 RIAA 7, and modified in the Agreement between Great Britain and the United States of America for the Settlement of Certain Pecuniary Claims (Washington, 18 August 1910; TS 11 (1912); Cd 6201) (see *Robert E Brown Case* 6 RIAA 120 at 129 (1923)). The treaty must clearly be to this effect and the rule should not be held to have been dispensed with tacitly: *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15 at 42 (para 50). See also ADP art 15(e). See further PARA 411.

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#### **407. Cases in which there is no requirement to exhaust local remedies.**

The exhaustion of local remedies rule<sup>1</sup> cannot apply if there are no reasonably available local remedies to exhaust, and does not apply if any available remedies provide no reasonable possibility of effective redress<sup>2</sup>. This may be so where the courts are completely under the control of the government which has caused the injury<sup>3</sup>; where there is an undue delay in hearing the case<sup>4</sup>; where the case is likely to result in the application of a uniform line of decisions, or of clearly applicable legislation<sup>5</sup>; where the result would not prevent further damages or a repetition of the injury in relation to which complaint is made<sup>6</sup>; where the courts have no jurisdiction under domestic law to hear the case<sup>7</sup>, for instance where there can be no action against the government<sup>8</sup>; where the remedy would not afford adequate or appropriate reparation<sup>9</sup>; or where the state has taken measures to prevent access to the tribunals in question<sup>10</sup>. It has also been proposed that there should be a residual exception such that there is no requirement to exhaust local remedies where the injured person is 'manifestly precluded' from pursuing such remedies<sup>11</sup>, although normally an injured person is not excused from attempting to exhaust local remedies merely through lack of means<sup>12</sup>.

1 As to the exhaustion of local remedies rule see PARA 405.

2 Cf the Articles on Diplomatic Protection ('ADP') art 15(a), Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV. The ILC preferred the formulation that there is no requirement to exhaust local remedies where there is 'no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress'; in doing so, it considered and rejected alternative formulations that the local remedies should not be 'obviously futile' or 'offer no reasonable prospect of success', although those alternative formulations both find some support in the authorities: see ADP art 15(a), Commentary to Article 15, paras (2)-(4). See also the ILC Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 44 (which refers to 'available and effective' remedies), International Law Commission Report, 53rd Session, A/56/10, YILC 2001, vol II(2); and PARA 330.

As to the 'obvious futility' test see *Finnish Shipowners* 3 RIAA 1479 (1934), where it was held that it must be possible to demonstrate on the basis of clear evidence that resort to the remedies would not produce a decision in favour of the foreign national. It has been suggested that if the remedy is not obviously futile, however contingent or theoretical it may be, an effort should be made to exhaust it: see eg *Certain Norwegian Loans (France v Norway) (Preliminary Objections)* ICJ Reports 1957, 9 at 39 per Judge Lauterpacht. As to non-existence of remedies see eg *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* ICJ Reports, 24 May 2007 (para 47). In the United Kingdom government's view, failure to exhaust the local remedies is no bar to a claim if it is clearly established that in the circumstances of the case an appeal to a higher municipal tribunal would have had no effect, nor is a claimant in another state required to exhaust justice in that state where there is no justice to exhaust: Rules Applying to International Claims 1985 r VII, comment (reproduced in 37 ICLQ 1006 (1988)). Further, the United Kingdom government may intervene on the claimant's behalf to secure redress of injustice: Rules Applying to International Claims 1985 r VIII.

3 *Robert E Brown Case* 6 RIAA 120 (1923). The same has been held to be the case where the courts have been appointed by the legislature which has annulled the rights of the foreign national: *Tinoco Arbitration* 1 RIAA 369 at 375, 387 (1923).

4 See *El Oro Mining and Rly Co Ltd* 5 RIAA 191 (1931) (nine years' delay); *Administration of the Prince Von Pless* PCIJ Ser A/B No 52 (1933). All the circumstances must be taken into account: see *Interhandel (Switzerland v United States of America) (Preliminary Objections)* ICJ Reports 1959, 6 (ten years from institution of the action; remedies held not to have been exhausted). See also ADP art 15(b), which clarifies that the undue delay must be attributable to the state.

5 See eg *Finnish Shipowners* 3 RIAA 1479 at 1495 (1934); *Panevezys-Saldutiskis Railway (Estonia v Lithuania)* PCIJ Ser A/B No 76 at 18 (1939).



6 *De Sabla Case* 6 RIAA 358 (1933).

7 *Finnish Shipowners Case* 3 RIAA 1479 (1934) (appeal only on point of law, not on facts). The case must be a clear one: see *Panevezys-Saldutiskis Railway (Estonia v Lithuania)* PCIJ Ser A/B No 76 (1939); *Certain Norwegian Loans (Preliminary Objections) (France v Norway)* ICJ Reports 1957, 9 at 39; *Interhandel (Switzerland v United States of America) (Preliminary Objections)* ICJ Reports 1959, 6 at 27-28.

8 *Forests of Central Rhodope* 3 RIAA 1406 at 1420 (1953). However, although this case suggests that remedies need not be exhausted if the government itself has caused the injury complained of, this is only true if the local law does not permit proceedings against the government. As to the position of the United Kingdom see the Crown Proceedings Act 1947; and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 110 et seq. Where a government may be sued in its own courts for violation of rights under international law the action must be pressed to a conclusion: *Interhandel (Switzerland v United States of America) (Preliminary Objections)* ICJ Reports 1959, 6 at 27.

9 There is no obligation to have recourse to courts which cannot award compensation: see eg *Finnish Shipowners* 3 RIAA 1479 at 1479 (1934).

10 *Factory at Chorzów (Jurisdiction)* PCIJ Rep Ser A No 9 at 25-31 (1927).

11 See ADP art 15(d). As to the narrow scope of the proposed exception see ADP, Commentary to Article 15, para (11).

12 Cf the discussion in *The Loewen Group, Inc and Raymond L Loewen v United States of America* ICSID Case No ARB(AF)/98/3, Award of 26 June, (2003) 7 ICSID Reports 442 in relation to a requirement under the applicable law of the posting of an appeal bond as a condition for an appeal.

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#### **408. Calvo clauses.**

The insertion of a 'Calvo clause'<sup>1</sup> in a contract between a state<sup>2</sup> and an alien is intended to have as its effect: (1) that all disputes concerning the contract, its interpretation and performance are to be decided solely by the courts of that state, whose law is the applicable law of the contract<sup>3</sup>; and (2) that the alien makes a complete or partial surrender of his rights as well as those of his state under international law, and waives the possibility of protection by his own state<sup>4</sup>.

1 The 'Calvo clause' is named after Carlos Calvo, the Argentine jurist who propounded it in 1868.

2 In order to have effect, it is necessary that the clause must emanate from the central government and not from a subordinate authority: *MacNeill* 5 RIAA 135 (1931).

3 As to the applicable law see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 349 et seq.

4 For an analysis of various terms of clauses in contracts which have been considered by international arbitral tribunals see Lipstein 'The Place of the Calvo Clause in International Law' 22 BYIL 130.

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#### 409. Effect of Calvo clauses.

In so far as a Calvo clause<sup>1</sup> provides for submission of disputes to the local courts, it appears to do no more than to state the requirement of exhaustion of local remedies<sup>2</sup> and is therefore unnecessary, but in so far as it imports a submission to the local law it may be effective<sup>3</sup>. In so far as the clause purports to be a waiver of the rights of the alien and of the right of his state to make a claim on his behalf by way of diplomatic protection, it appears to be invalid<sup>4</sup>. In any case, a Calvo clause may be of no relevance if an international claim is not based upon the contract in which it is contained<sup>5</sup>.

1 As to Calvo clauses see PARA 408.

2 As to the rule regarding the exhaustion of local remedies see PARA 405.

3 See eg *North American Dredging Co of Texas* 4 RIAA 26 at 29 (1926). As to the applicable law see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 349 et seq.

4 *Martini* 10 RIAA 644 (1903); *Woodruff* 9 RIAA 213 (1905); *Tinoco Arbitration* 1 RIAA 369 at 384 et seq (1923); *International Fisheries* 4 RIAA 691 (1931). See also the Reply of the United Kingdom Government to the League of Nations Preparatory Commission for the Hague Codification Conference 1930 Bases of Discussion vol III, 134. As to the principle that when a state brings an international claim it is claiming for an injury to itself see PARA 387. For the view that, although municipal law states what the rights of the alien are, international law decides whether they are violated see *Orinoco Steamship Co* 9 RIAA 180 (1903); *Woodruff* 9 RIAA 213 (1905); *North and South American Construction Co* (1892) Moore Int Arb 2318. Cf *Turnbull* 9 RIAA 261 at 304 (1904).

5 Eg if the claim is for damage to property during a civil disturbance or for acts of expropriation by the government: *Selwyn* 9 RIAA 380 (1903).

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**410. Calvo clause by legislation.**

Any rule that an alien is bound by a renunciation clause<sup>1</sup> does not apply if the clause is not contained in an agreement to which he is a party, but purports to be imposed by legislation. Although such legislation forms part of the law of contract, it does not preclude an international claim<sup>2</sup>.

<sup>1</sup> Ie such as a Calvo clause. As to Calvo clauses see PARA 408.

<sup>2</sup> *North American Dredging Co of Texas* 4 RIAA 26 (1926). In 1921 the United Kingdom government stated, in connection with Ecuadorian legislation of 1921, that 'the circumstances in which they are entitled to afford diplomatic protection are not affected in any way by foreign domestic legislation': 114 BFSP 734n.

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**411. Waiver of application of local remedies rule by treaty.**

The agreement nominating an arbitral tribunal may be framed so as to subject claims to its jurisdiction even though local remedies have not been exhausted<sup>1</sup>. In such a case, the tribunal will have jurisdiction and claims will be not be inadmissible merely on the basis that local remedies have not been exhausted<sup>2</sup>. If, however, the parties have agreed to the settlement of any dispute arising out of a contract by the local courts of the contracting state, the tribunal is not able to decide such a dispute until the alien has exhausted the domestic remedies, although other claimants are not bound to do so<sup>3</sup>.

1 For examples see PARA 406 note 4. As to the exhaustion of local remedies see PARA 405.

2 *Martini* 10 RIAA 644 (1903). Where the tribunal is given power to decide claims on an equitable basis, thus dispensing with technical rules of international law, a Calvo clause may not be relied on, as such, by way of defence: *Pinson* 5 RIAA 327 (1928). As to Calvo clauses see PARA 408.

3 In such case the claimant may not ignore the local remedies, since to do so would place the state inequitably in a worse position than the claimant: *Rudloff Case* 9 RIAA 244 (1903). See also *French Co of Venezuela Railroads* 10 RIAA 285 at 335 (1903); *Martini* 10 RIAA 644 (1903); *Selwyn* 9 RIAA 380 (1903); *American Electric and Manufacturing Co* 9 RIAA 145 (1904); *North American Dredging Co of Texas* 4 RIAA 26 (1926).

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### **(3) CONSULAR ACCESS AND ASSISTANCE**

#### **412. In general.**

The rules of international law relating to consular access and assistance are of relevance both in relation to the situation of foreign nationals within the United Kingdom, as well as regards the provision of consular access and assistance by the United Kingdom to British nationals abroad<sup>1</sup>.

<sup>1</sup> The principal instrument is the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219). As to the Vienna Convention, and its incorporation into English law by the Consular Relations Act 1968, see PARA 290. In addition, the United Kingdom has entered into various bilateral agreements relating to consular matters: see PARA 416 note 2. See also the Treaty on the Functioning of the European Union (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 20(c), which envisages that any citizen of the European Union present in the territory of a third country in which his state of nationality is not represented, is to be entitled to protection by the consular or diplomatic authorities of any member state of the Union on the same conditions as the nationals of that member state (the Treaty was formerly known as the Treaty Establishing the European Community; it has been renamed and its provisions renumbered: see PARA 304 note 1). As to consular protection by the authorities of member states see Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations 95/553/EC (OJ L314, 28.12.1995, p 73); cf in this regard the Vienna Convention on Consular Relations art 8, which provides that a state may exercise consular functions on behalf of another state provided that the state in which the functions are to be performed has been notified and does not object. The EC Treaty art 20 envisages that international negotiations will be required to secure such protection. See also the Green Paper on Diplomatic and Consular Protection of Union Citizens in Third Countries (COM (2006) 712). As to the distinction between consular assistance, the exercise of diplomatic protection and other action (including diplomatic representations or demarches) on the international plane see PARA 384. As to the meaning of 'British national' for these purposes see PARA 420.

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#### **413. General considerations.**

Under the Vienna Convention on Consular Relations<sup>1</sup>, the functions of the consular officers<sup>2</sup> of a sending state present in the receiving state are defined as including the protection in the receiving state, within the limits permitted by international law, of the interests of the sending state and of its nationals, both individuals and bodies corporate<sup>3</sup>, and helping and assisting nationals, both individuals and bodies corporate, of the sending state<sup>4</sup>. With a view to facilitating the exercise of consular functions relating to nationals of the sending state<sup>5</sup>, a receiving state is under general obligations relating to access and communication between the consular officers of the sending state and its nationals, as well as certain specific obligations in relation to the provision of information, notification and communication in circumstances in which nationals of the sending state are arrested or otherwise detained<sup>6</sup>.

1 The Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219).

2 As to the meaning of 'consular officer' see PARA 30 note 1.

3 Vienna Convention on Consular Relations art 5(a). Article 5 forms part of English law, by virtue of the Consular Relations Act 1968 s 1, Sch 1: see PARA 419.

4 Vienna Convention on Consular Relations art 5(e).

5 See the Vienna Convention on Consular Relations art 36(1). Article 36 is not among the provisions of the Convention which have been given the force of law in the United Kingdom by the Consular Relations Act 1968 s 1, Sch 1: see PARA 419.

6 See the Vienna Convention on Consular Relations art 36(1)(a)-(c); and PARAS 414-418. All of those rights must be exercised in conformity with the laws and regulations of the receiving state, provided that those laws and regulations must enable full effect to be given to the purposes for which the rights are intended: see art 36(2). See note 5.

In addition, the Convention imposes a number of other obligations requiring the provision of notice in certain other circumstances concerning the nationals, ships or aircraft of other states parties. Where a national of another state party dies within the receiving state, the receiving state is under an obligation to inform the consular post of the state of nationality for the district in which the death occurred without delay: see art 37(a). A receiving state is under an obligation to provide information to the relevant consular post where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of another state, although the provision of such information is expressly stipulated to be without prejudice to the operation of the laws and regulations concerning such appointments: see art 37(b). See also art 5(h), which defines consular functions as including safeguarding, within the limits imposed by the laws and regulations of the receiving state, the interests of minors and other persons lacking full capacity who are nationals of the sending state, particularly where any guardianship or trusteeship is required with respect to such persons. Where a vessel having the nationality of one state party to the Convention is wrecked or runs aground in the territorial sea or internal waters of another state party, or an aircraft registered in one state party suffers an accident on the territory of another state party, the state in which the incident occurs is under an obligation to inform without delay the consular post nearest to the scene of the occurrence: see art 37(c). In all of these cases, the obligations are limited to circumstances in which the relevant information is available: see art 37. Article 37 is not among the provisions of the Convention which have been given the force of law in the United Kingdom by the Consular Relations Act 1968 s 1, Sch 1 (see PARA 419), and no other legislation has been adopted giving effect to the obligations in question. As to the meaning of 'consular post' see PARA 30 note 1.

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**414. Freedom of communication and access between foreign nationals and consular authorities.**

The consular officers<sup>1</sup> of any state party to the Vienna Convention on Consular Relations<sup>2</sup> have the freedom to communicate with their nationals and to have access to them, and nationals of the sending state have the same freedom with respect to communication with and access to the consular officers of their state of nationality<sup>3</sup>.

1 As to the meaning of 'consular officer' see PARA 30 note 1.

2 Ie the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219).

3 Vienna Convention on Consular Relations art 36(1)(a).



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#### **415. Notification of consular rights to detained foreign nationals.**

A national of a state party to the Vienna Convention on Consular Relations<sup>1</sup> who has been arrested or detained has a right to be informed by the competent authorities without delay of the right to request that the consular post of his state of nationality be informed and of his right to send communications to the consular post<sup>2</sup>. The requirement that the detained individual be informed of his rights 'without delay' does not require provision of the relevant information immediately upon arrest and prior to any interrogation; nevertheless, the obligation to inform the individual of his rights arises at such time as it is realised that the detainee is a foreign national, or once there are grounds to think that the individual is probably a foreign national<sup>3</sup>. It is no defence to argue that it was assumed that the individual would prefer that the consular authorities of his state of nationality should not be informed of his arrest<sup>4</sup>. In this regard, the Convention not only imposes an obligation owed to the state of nationality of the detained individual, breach of which constitutes a direct violation of the rights of that state<sup>5</sup>, but also creates an individual right under international law for the detained individual, which can be enforced on his behalf by the state of nationality by way of diplomatic protection<sup>6</sup>. Further, depending on the circumstances, a breach of the obligation to provide information as to his consular rights to a detained national of a state party to the Convention may result in a violation of other rights under the Convention of the state of nationality relating to detained nationals<sup>7</sup>.

1    le the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219).

2    See the Vienna Convention on Consular Relations art 36(1)(b). As to the meaning of 'consular post' see PARA 30 note 1.

3    *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 43 (para 63), 48-49 (paras 83-88).

4    *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 46 (para 76).

5    *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 35-36 (para 40).

6    *LaGrand (Germany v United States of America)* ICJ Reports 2001, 466 at 494 (para 77); *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 35-36 (para 40). As to the nature of diplomatic protection see PARA 386. Given the dual character of the violation as involving a breach of the rights of both the national state and of the individual, it has been held that there is no obligation to exhaust local remedies before bringing a claim: *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 36 (para 40). The International Court of Justice has not felt it necessary to decide whether the right to notification constitutes a human right of the detained individual: *LaGrand (Germany v United States of America)* ICJ Reports 2001, 466 at 494 (para 78); and see *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 61 (para 124); cf the decision of the Inter-American Court of Human Rights in *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (Advisory Opinion OC-16/99) I-ACtHR Ser A No 16 (1999) (the decision that the right constituted a human right was reached in the context of the American Convention on Human Rights 1969 (San José, Costa Rica; 22 November 1969; (1970) 9 ILM 673) art 64(1), which gives the Inter-American Court jurisdiction to give advisory opinions concerning the interpretation of the American Convention 'or of other treaties concerning the protection of human rights in the American states').

7    See *LaGrand (Germany v United States of America)* ICJ Reports 2001, 466 at 492 (para 74); cf *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12 at 52-53 (paras 99-105).



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**416. Notification of detention of foreign nationals to consular post of state of nationality.**

If a national of any state party to the Vienna Convention on Consular Relations<sup>1</sup> is arrested, or is committed to prison or to custody pending trial, or is detained in any other manner, the competent authorities must at his request inform, without delay, that state's consular post for the relevant consular district<sup>2</sup>.

1    le the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219).

2    See the Vienna Convention on Consular Relations art 36(1)(b). As to the meaning of 'consular post' see PARA 30 note 1. As to the right under the Convention of the detained person to be notified in this regard see PARA 415. In addition to the obligations contained in the Convention, the United Kingdom has entered into a number of bilateral agreements relating to consular matters which require notification to the appropriate High Commission, embassy or consulate as soon as is practicable when one of the nationals of the other state is arrested, and without any prior request by the detainee. The Police and Criminal Evidence Act 1984 Code of Practice C Annex F (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 954) lists the countries with which such agreements had been concluded, as follows: Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, China, Croatia, Cuba, Czech Republic, Denmark, Egypt, France, Georgia, German Federal Republic, Greece, Hungary, Italy, Japan, Kazakhstan, Macedonia, Mexico, Moldova, Mongolia, Norway, Poland, Romania, Russia, Slovak Republic, Slovenia, Spain, Sweden, Tajikistan, Turkmenistan, Ukraine, USA, Uzbekistan, and Yugoslavia; but note that, in relation to nationals of China arrested or detained in the United Kingdom, the police are required to inform Chinese consular officials of arrest or detention only in the Manchester consular district (comprising Derbyshire, Durham, Greater Manchester, Lancashire, Merseyside, North, South and West Yorkshire, and Tyne and Wear) (see Whormersley 'The United Kingdom-China Consular Agreement' (1985) 34 ICLQ 621).

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**417. Communication of detained foreign nationals with consular post of state of nationality.**

In addition to the general right of communication between foreign nationals and the consular officers<sup>1</sup> of their state of nationality<sup>2</sup>, any communication by a foreign national of a state party to the Vienna Convention on Consular Relations<sup>3</sup> who is arrested or otherwise detained, which is addressed to the consular post<sup>4</sup> of his state of nationality, must be forwarded without delay by the competent authorities<sup>5</sup>.

1 As to the meaning of 'consular officer' see PARA 30 note 1.

2 See PARA 414.

3 Ie the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219).

4 As to the meaning of 'consular post' see PARA 30 note 1.

5 See the Vienna Convention on Consular Relations art 36(1)(b). As to the right under the Convention of the detained person to be notified in this regard see PARA 415.

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**418. Rights of consular access and assistance in relation to detained persons.**

Under the Vienna Convention on Consular Relations<sup>1</sup>, the consular officers<sup>2</sup> of a state party have a right to visit a national who is in prison, custody or detention, to converse and correspond with him, and to arrange for his legal representation<sup>3</sup>. In addition, the consular officers of a state party to the Convention have a right to visit any national who is in prison, custody or detention pursuant to a judgment<sup>4</sup>. However, a consular officer must refrain from taking action on behalf of a national who is in prison, custody or detention if the national expressly opposes such action<sup>5</sup>.

1    le the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219).

2    As to the meaning of 'consular officer' see PARA 30 note 1.

3    See the Vienna Convention on Consular Relations art 36(1)(c).

4    See the Vienna Convention on Consular Relations art 36(1)(b).

5    See the Vienna Convention on Consular Relations art 36(1)(b).

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#### **419. Implementation in the United Kingdom of international obligations relating to consular access and assistance.**

Although some provisions of the Vienna Convention on Consular Relations<sup>1</sup> have been incorporated and given the force of law in the United Kingdom by the Consular Relations Act 1968<sup>2</sup>, the provisions of the Convention relating to consular access and assistance in relation to detained nationals and the rights of a detained foreign national to information as to his consular rights are not among those provisions<sup>3</sup>. However, some of those obligations are implemented through the relevant Codes of Practice adopted under the Police and Criminal Evidence Act 1984<sup>4</sup>, although they are not limited in their application to nationals of states parties to the Convention and apply to all foreign nationals<sup>5</sup>. The Codes of Practice recognise the right of a detained foreign national to communicate with the relevant consular authorities of his state of nationality<sup>6</sup>. A detained foreign national must be informed as soon as practicable of that right and of the right to request that the consular authorities be informed of his whereabouts and the grounds for his detention<sup>7</sup>. Any such request must be acted upon as soon as is practicable<sup>8</sup>. The Codes of Practice also recognise the right of the consular authorities to visit a detained foreign national and to meet with him out of the hearing of a police officer, as well as, if required, to arrange for his legal representation<sup>9</sup>. Compliance with consular obligations in relation to foreign nationals may not be delayed, even if other rights of the detainee, including those relating to notification to a responsible adult or member of family and access to a solicitor, are delayed<sup>10</sup>. Provision is also made in the Codes of Practice for compliance with those bilateral consular conventions which require immediate notification to the consular authorities of the state of nationality upon arrest, irrespective of a request by the national<sup>11</sup>. However, if the detainee is a political refugee or seeks political asylum, notification of arrest and access to information about the detainee is not to be provided to consular officers except at the express request of the detainee<sup>12</sup>.

1    le the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219).

2    See the Consular Relations Act 1968 s 1(1), Sch 1 (amended by the Diplomatic and Consular Premises Act 1987 Sch 2), giving force of law in the United Kingdom to the Vienna Convention on Consular Relations arts 1, 5, 15, 17, 27, 31-33, 35, 39, 41, 43-45, 48-55, 57, 58 (in part), 59-62, 66, 67 and 70-71. See further PARA 290.

3    As to the provisions relating to consular access and assistance in relation to detained nationals, and information as to consular rights, see the Vienna Convention on Consular Relations art 36; and PARAS 413-418. Article 37, relating to the other specific obligations of notification, is also not among the provisions incorporated into United Kingdom law: see PARA 413 note 6.

4    See Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 908 et seq. See also Code H: Code of Practice in connection with the Detention, Treatment and Questioning by Police Officers of Persons under Section 41 of, and Schedule 8 to, the Terrorism Act 2000; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 421 et seq. See in particular **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 954.

5    Code C para 7.1; Code H para 7.1.

6    Code C para 7.1; Code H para 7.1. See also PARAS 413-414, 416-417.

7    Code C para 7.1; Code H para 7.1. See also PARA 415.

- 8 Code C para 7.1; Code H para 7.1.
- 9 Code C para 7.3; Code H para 7.3. See also PARA 418.
- 10 See Code C Guidance note 7A, Annex B; and Code H Guidance note 7A, Annex B.
- 11 Code C para 7.2; Code H para 7.2. For the list of states in question see Code C Annex F; Code H Annex F; and PARA 416 note 2.
- 12 Code C para 7.4; Code H para 7.4.

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#### **420. Consular access and assistance in relation to United Kingdom nationals abroad.**

Under the Vienna Convention on Consular Relations<sup>1</sup>, the United Kingdom enjoys the various rights of communication, access and notification in relation to British nationals abroad (including those detained)<sup>2</sup>. The Foreign and Commonwealth Office from time to time publishes guidance on the consular assistance it will provide to British nationals abroad<sup>3</sup>. For these purposes, a British national is a British citizen, a British overseas territories citizen, a British overseas citizen, a British national (overseas), a British subject, or a British protected person<sup>4</sup>. As a matter of policy, financial assistance may exceptionally be provided to British nationals who are the victims of terrorist attacks abroad, or other major catastrophes<sup>5</sup>.

The subject matter of a decision relating to the conduct of international relations is subject to only limited judicial review by the courts<sup>6</sup>. It has been held that a refusal to seek to effect consular visits, to provide other consular assistance, or to make diplomatic representations in relation to a non-British national lawfully resident in the United Kingdom does not constitute discrimination under the Race Relations Act 1976<sup>7</sup>, or a discriminatory interference with the right to family life of such an individual or his close family under the Human Rights Act 1998<sup>8</sup>.

1    le the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219).

2    See PARAS 413-418.

3    See Foreign and Commonwealth Office *Support for British Nationals Abroad: A Guide* (2009).

4    Foreign and Commonwealth Office *Support for British Nationals Abroad: A Guide* (2009) pp 7, 28 (Appendix). As to British citizens, British overseas territories citizens, British overseas citizens, British nationals (overseas), British subjects, and British protected persons see PARA 398 note 1; and see further **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 5 et seq. No consular assistance is provided to British nationals (overseas) of Chinese ethnic origin in China, or in the Hong Kong and Macao Special Administrative Regions given that the Chinese authorities consider British nationals (overseas) of Chinese ethnic origin to be Chinese nationals. In relation to dual nationals in third countries, consular assistance will normally be provided if the individual was travelling on a British passport; assistance will not normally be provided in the other state of nationality, although an exception may be made if there is an exceptional humanitarian reason for doing so: Foreign and Commonwealth Office *Support for British Nationals Abroad: A Guide* (2009) p 7. In relation to protection of citizens of the European Union by the consular or diplomatic authorities of other member states in third states where the member state of which they are a national is not represented see the Treaty on the Functioning of the European Union (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 20; and PARA 412 note 1.

5    As to the written ministerial statement relating to exceptional assistance measures for victims of terrorist incidents overseas see 476 HC Official Report (6th series), 2 June 2008, cols 40-41. See also Foreign and Commonwealth Office *Support for British Nationals Abroad: A Guide* (2009) p 24.

6    *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2002] All ER (D) 70 (Nov) (diplomatic representations on behalf of a British national). See also PARA 388.

7    *R (on the application of Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs (United Nations High Commissioner for Refugees intervening)* [2006] EWCA Civ 1279, [2008] QB 289, [2006] All ER (D) 138 (Oct) at [65]-[83], [87]. As to the requirement of nationality for the purposes of the exercise of diplomatic protection see PARA 391 et seq.



8 *R (on the application of Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs (United Nations High Commissioner for Refugees intervening)* [2006] EWCA Civ 1279, [2008] QB 289, [2006] All ER (D) 138 (Oct) at [84]-[87] (the court reasoned that, the Articles on Diplomatic Protection ('ADP') art 8, Report of the International Law Commission ('ILC'), 58th Session (2006), A/61/10, ch IV being *lex ferenda*, there is no generally accepted rule as a matter of international law which grants a state the right to provide consular assistance or to make diplomatic representations in relation to non-nationals habitually resident and having refugee status: see at [115]-[119]).

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## **14. INTERNATIONAL CRIMINAL LAW**

### **(1) IN GENERAL**

#### **421. Introduction.**

'International Criminal Law' is not a term of art but a description of conduct made criminal in international law, in national law because of an international obligation or, sometimes, both<sup>1</sup>. It is not restricted to identifying conduct which is or must be made criminal but deals inter alia with jurisdiction over crime<sup>2</sup>, and co-operation with other states with regard to obtaining custody of suspects, their trial and sentencing<sup>3</sup>. International criminal law also covers the creation and powers of international criminal tribunals, with which states have obligations of co-operation different from those they owe to other states<sup>4</sup>.

The various sources of international criminal law may contain specific standards of fair trial or may rely indirectly on the international obligations and national laws of individual states<sup>5</sup>. There has been some development of substantive international criminal law in recent years and a considerable expansion in international tribunals which have a criminal jurisdiction<sup>6</sup>. Combined with the national implementation of crimes against international law, itself based on extended jurisdictional claims<sup>7</sup>, these changes are part of a project to deny impunity to those responsible for the commission of crimes against international law.

1 Crimes created in national law because of an international obligation which correspond with crimes against international law, such as genocide, are to be distinguished from 'transnational crimes' created in national law because of a treaty obligation to do so, such as those directed against terrorism, although the two categories have much in common: see PARA 427.

2 See PARA 425.

3 See PARA 436.

4 See PARA 436.

5 As to the sources of international criminal law see PARA 423.

6 This process effectively began with the establishment of the International Criminal Tribunal for the Former Yugoslavia in 1993 (see the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/25704 at 36, annex (1993) and S/25704/Add 1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993)) and has continued, inter alia, with the establishment of the International Criminal Tribunal for Rwanda (see the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted by the Security Council on 8 November 1994, UN Doc S/RES/955 (1994)), and the International Criminal Court (see the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999); and PARA 437).

7 Notably claims of universal or quasi-universal jurisdiction over the conduct constituting crimes against international law: see PARA 425.

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## 422. International crimes.

In an early codification of international criminal law<sup>1</sup>, the Charter of the International Military Tribunal at Nuremberg listed three crimes within the jurisdiction of the tribunal which have had continuing significance in the development of international criminal law<sup>2</sup>: crimes against peace<sup>3</sup>; war crimes<sup>4</sup>; and crimes against humanity<sup>5</sup>. It remains a matter of contention as to which of these offences were actually established as international crimes by customary law by the time of the commencement of World War II, although it is widely accepted that these crimes had attained customary law status by 1950<sup>6</sup>.

The United Nations Security Council accepted that grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity were international crimes by customary law by 1993<sup>7</sup>. It has also been suggested that torture was established as a crime in international law before the UN Torture Convention of 1984<sup>8</sup>.

The Statute of the International Criminal Court (the 'ICC') contains a list of four international crimes, some set out in great detail, not every item of which is confirmed by customary international law: aggression (which has yet to be defined and is to be distinguished from the Nuremberg crime of planning etc a war of aggression); genocide; war crimes; and crimes against humanity<sup>9</sup>. Together, these are frequently referred to as the 'core' international crimes and it is suggested that they are surrounded by similar regimes of obligations of jurisdiction, investigation, trial and co-operation<sup>10</sup>.

1 It is sometimes suggested that piracy was the first crime against international law but, although there is an international definition, it is better to see piracy as conduct which states may proscribe and punish in their national laws without any restrictions as to jurisdiction: see PARA 155 et seq.

2 See the Charter of the International Military Tribunal (London, 8 August 1945; TS 27 (1946); Cmd 6903) art 6. It is to be noticed that genocide was not, *eo nomine*, among the offences within the jurisdiction of the International Military Tribunal: as to genocide see PARA 429.

3 Namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing: see the Charter of the International Military Tribunal, art 6(a).

4 Namely, violations of the laws or customs of war, including, but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity: the Charter of the International Military Tribunal, art 6(b).

5 Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated: the Charter of the International Military Tribunal, art 6(c).

6 See the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal 1950 International Law Commission (the 'ILC'), A/1316 (1950), principle VI. See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* ICJ Reports 1951, 15 at 23; and *R v Jones; Ayliffe v DPP; Swain v DPP* [2006] UKHL 16, [2007] 1 AC 136 at [19] per Lord Bingham (planning etc a war of aggression).

7 See the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ('ICTY'), UN Doc S/25704 at 36, annex (1993) and S/25704/Add 1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993) arts 2-5; Statute of the International Criminal Tribunal for the Prosecution of

Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ('ICTR'), adopted by the Security Council on 8 November 1994, UN Doc S/RES/955 (1994) arts 2-4 (note that there are some differences in the ways the crimes are defined). See also the Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 of 22 February 1993; and *Prosecutor v Tadic* Case No IT-94-1-AR72 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995), ICTY (Appeals Chamber).

8 See *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3) (Amnesty International intervening)* [2000] 1 AC 147, [1999] 2 All ER 97; and *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221, [2006] 1 All ER 575 at [33]. Similar claims are made about slavery but the evidence is less specific. See PARAS 433-434. The UN Torture Convention 1984 means the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 4 February 1985; Misc 12 (1985); Cmnd 9593).

9 See the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999) arts 5-8; and PARAS 429-431. There are, in addition, 'Elements of Crimes' to assist the ICC in the interpretation and application of arts 6-8: art 9(1). For procedural matters relating to the Elements of Crimes see art 9. The text of the Elements of Crimes was adopted by the assembly of states parties on 22 September 2002 (see the UN Doc PCNICC/2000/1/Add.2 (2000)), and is set out in the International Criminal Court Act 2001 (Elements of Crimes) (No 2) Regulations 2004, SI 2004/3239, Sch.

10 See PARA 428 et seq. These obligations, or variants on them, are sometimes included in treaties which refer to the international criminal nature of the conduct constituting the particular crimes in the treaty: see eg the Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948; TS 58 (1970); Cmnd 4421).

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### 423. Sources of international criminal law.

International criminal law is found in treaties and customary international law, and is closely related to the international law of human rights<sup>1</sup>. The United Nations Security Council has exercised its powers<sup>2</sup> to take action in the sphere of international criminal law<sup>3</sup>. It is important to emphasise that only the parties to treaties dealing with international criminal law are bound by their provisions<sup>4</sup>.

Because it is envisaged that some trials of those accused of conduct amounting to crimes under international law will be held before national courts, the accurate implementation of international law into national law is essential if the impunity of those suspected of crimes against international law is to be diminished<sup>5</sup>. Conduct made criminal in national law might already be criminal in international law, and under those circumstances there is no objection from the perspective of the principle of legality to making the conduct criminal retrospectively<sup>6</sup>.

It is essential that where a state exercises extraterritorial prescriptive jurisdiction over conduct constituting an international crime that it does so compatibly with international law<sup>7</sup>.

1 As to human rights law see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq.

2 Including those under the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) Ch VII. The Security Council also has powers under the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999) arts 13(b), 16.

3 It has, for example, established the International Criminal Tribunal for the Former Yugoslavia ('ICTY') (see the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993)) and the International Criminal Tribunal for Rwanda ('ICTR') (see the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted by the Security Council on 8 November 1994, UN Doc S/RES/955 (1994)); and referred matters to the International Criminal Court (see eg UN Doc S/RES/1593 (2005) (Darfur)).

4 As to treaties and treaty obligations see PARA 71 et seq.

5 As to the implementation of international law into United Kingdom law see eg the Geneva Conventions Act 1957 (see **WAR AND ARMED CONFLICT**); the International Criminal Courts Act 2001 (see PARA 437 et seq); the Criminal Justice Act 1988 ss 134-138 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 160); and the War Crimes Act 1991 (**WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 465).

6 See the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969; ETS no 5) art 7(1) (and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 148); and *Kononov v Latvia* (2008) 25 BHRC 317, [2008] ECHR 36376/04 (the case has been referred to the Grand Chamber).

7 *Jorgic v Germany* (2007) 47 EHRR 207, 25 BHRC 287, [2007] ECHR 74613/01.

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#### **424. The nature of substantive international criminal law.**

States do not have criminal liability in customary international law nor are they made potentially criminally responsible by treaties requiring action to create crimes in national law<sup>1</sup>. Criminal liability is ordinarily confined to individuals, though there is no reason in principle why other legal persons should not be made criminally liable by international law<sup>2</sup>. In international law, the fact that a person was acting in an official capacity is not a barrier to his liability<sup>3</sup>, though in some special cases official status is a bar to liability for crimes created in domestic law<sup>4</sup>. Criminal liability may arise not only from direct commission of the forbidden conduct but by reason of ordering, failing to prevent or failing to punish the forbidden conduct of others<sup>5</sup>.

The question of immunities and international criminal law is complex but it is clear that treaties may exclude, expressly or impliedly, immunities of one kind or another<sup>6</sup>. Binding decisions of the United Nations Security Council will take priority over immunities, whether they depend upon treaties or customary international law<sup>7</sup>.

1 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced': see the Judgment of the International Military Tribunal for the Trial of the Major War Criminals (1946; Misc 12 (1946); Cmd 6964) at p 41. The International Law Commission (the 'ILC') did not include any notion of state criminal responsibility in its Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA'): see the International Law Commission Report, 53rd Session, A/56/10; YILC 2001, vol II(2), pp 26-30; and PARA 328 et seq.

2 See eg the Charter of the International Military Tribunal (London, 8 August 1945; TS 27 (1946); Cmd 6903) art 9.

3 See eg the Charter of the International Military Tribunal, art 9; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ('ICTY'), UN Doc S/25704 at 36, annex (1993) and S/25704/Add 1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993) art 7(2); Rome Statute of the International Criminal Court (the 'ICC') (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999) art 27(1).

4 See eg the International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997; TS 57 (2001); Cm 5347) art 19(2).

5 See eg the Statute of the ICC art 28; and the International Criminal Court Act 2001 s 65 (as to which see PARA 458).

6 As to immunities see PARA 242 et seq.

7 See *Prosecutor v Milosevic (Decision on Preliminary Motions)* Case No IT-99-37-PT (8 November 2001) ICTY. See also the International Criminal Court (Darfur) Order 2009, SI 2009/699, which precludes any state or diplomatic immunity from preventing proceedings under the International Criminal Court Act 2001 arising as a result of the reference to the ICC by the Security Council of the situation in Darfur; and PARA 446.

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#### **425. International crimes and jurisdiction.**

Although some crimes against international law arise by reason of customary international law<sup>1</sup>, the jurisdiction of international tribunals to try persons accused under international law depends on treaty or a decision of the United Nations Security Council<sup>2</sup>. There are various aspects to the jurisdiction of international tribunals:

- 98 (1) substantive jurisdiction; meaning the offences which fall within the tribunal's competence<sup>3</sup>;
- 99 (2) personal jurisdiction; meaning the persons who may be brought before the tribunal<sup>4</sup>;
- 100 (3) temporal jurisdiction; meaning the time at which the conduct constituting the crime occurred<sup>5</sup>; and
- 101 (4) locational jurisdiction; meaning the place where the conduct constituting the crime occurred<sup>6</sup>.

It is sometimes said that states have universal jurisdiction over international crimes under customary international law, although the United Kingdom has been notably cautious on this issue<sup>7</sup>. It is far from clear whether or not the exercise of this kind of jurisdiction is dependent upon the presence of the defendant in the territory or on the willingness or capacity of the territorial state to exercise jurisdiction itself, which is to say that while a state may have universal jurisdiction to criminalise conduct in the abstract, the exercise of that jurisdiction against a particular defendant may be subject to further conditions, beyond mere custody of the defendant<sup>8</sup>. Universal jurisdiction is, like other heads of jurisdiction, facilitative, but there may be duties to exercise jurisdiction<sup>9</sup> or to take alternative measures under treaty<sup>10</sup>.

1 See generally PARA 422.

2 Jurisdiction over any particular international crime and jurisdiction to try any particular defendant depends upon the terms of the treaty or Security Council resolution establishing the tribunal.

3 See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ('ICTY'), UN Doc S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993) art 2-5; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ('ICTR'), adopted by the Security Council on 8 November 1994, UN Doc S/RES/955 (1994)) art 2-4; Rome Statute of the International Criminal Court (the 'ICC') (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999) arts 5-9.

4 See the Statute of the ICTY art 6; the Statute of the ICTR art 5; and the Statute of the ICC arts 12(2), 25(1), 26.

5 See the Statute of the ICTY art 1; the Statute of the ICTR art 1; and the Statute of the ICC art 24.

6 See the Statute of the ICTY art 1; the Statute of the ICTR art 1 (partly combined with a nationality criterion); and the Statute of the ICC art 12(2) (supplemented by a nationality criterion).

8 See the United Kingdom's statement in General Assembly Sixth Committee, October 2009, UN Doc GA/L/3372. See also, more generally, Reydam's *Universal Jurisdiction: International and Municipal Legal Perspectives* (2004).

9 See eg the Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948; TS 58 (1970); Cmnd 4421) art 1; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (paras 428-450).

10 This is often expressed as the principle *aut judicare, aut dedere* (to judge, or, strictly, to submit for prosecution, or to hand over). The United Kingdom takes the view that this is an obligation which arises only by treaty: see (2007) BYIL 888-889.



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#### **426. International crimes and United Kingdom law.**

Crimes under customary international law or treaties are not crimes in English law without implementing legislation to make them so<sup>1</sup>. There is universal jurisdiction for grave breaches of the Geneva Conventions<sup>2</sup>, and for torture<sup>3</sup>. For the offences of genocide, war crimes and crimes against humanity<sup>4</sup>, jurisdiction is territorial or where conduct abroad is that of a United Kingdom national or resident or a person under United Kingdom service jurisdiction<sup>5</sup>. The implementing legislation frequently makes other provisions, such as providing for extraterritorial jurisdiction.

Other things being equal, the general part of the criminal law and the law of criminal procedure will apply to the investigation and prosecution of the domestic crime which mirrors the international crime<sup>6</sup>. However, legislation may make offence-specific provisions, where domestic law differs from the international law which surrounds the international crime<sup>7</sup>. Where conduct constituting an international crime is made criminal in national law, it will be so only from the date of the statute regardless of the date from which the conduct might have been criminal in international law, except where the statute provides to the contrary<sup>8</sup>.

1 *R v Jones; Ayliffe v DPP; Swain v DPP* [2006] UKHL 16, [2007] 1 AC 136. Piracy may be an exception, although the definition of piracy in the United Nations Convention on the Law of the Sea has been introduced into national law 'for the avoidance of doubt': see the Merchant Shipping and Maritime Security Act 1997 s 26(1); and PARA 156.

2 See PARA 432; the Geneva Conventions Act 1957 s 1(1); and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 424.

3 See the Criminal Justice Act 1988 s 134(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 160. See also *R v Zardad* [2007] EWCA Crim 279, [2007] All ER (D) 90 (Feb) (conviction of an Afghan national for acts of torture and hostage-taking in Afghanistan).

4 See under the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999) arts 6-8 (see PARA 422).

5 See the International Criminal Court Act 2001 s 51; and PARA 454.

6 See eg the International Criminal Court Act 2001 s 56(1); and PARA 454.

7 See eg the International Criminal Court Act 2001 ss 65, 66; and PARAS 457-458.

8 See eg the War Crimes Act 1991 s 1(1)(a) (and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 465); and the International Criminal Court Act 2001 ss 65A-65B (not yet in force) (see PARAS 454-455). There is no objection under human rights law to the retrospective criminalisation in national law of conduct earlier made criminal in international law: see the International Covenant on Civil and Political Rights (New York, 16 December 1966; ratified by the United Kingdom 20 May 1976; TS 6 (1977): Cmnd 6702) art 15(2); and the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969; ETS no 5) art 7; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 148.

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#### **427. Transnational criminal law.**

Transnational criminal law differs from international criminal law in that the conduct which is made criminal is criminal only in national law. The principal category is a series of suppression conventions in the field of counter-terrorism<sup>1</sup>, the central international obligation of which is to make certain identified conduct an offence in national law<sup>2</sup>, and with no equivalent international crime springing from the same conduct. An exception to this general rule is the crime of torture, and the United Nations Torture Convention belongs to the class of transnational criminal law treaties<sup>3</sup>.

The feature common to all of the suppression conventions is the obligation to make defined conduct criminal in a state's national law, punishable by penalties appropriate to the seriousness of the crimes<sup>4</sup>. In various ways the transnational criminal law treaties both require and allow that crimes thus created carry extraterritorial jurisdiction, although they do not explicitly require or permit universal jurisdiction<sup>5</sup>. The United Kingdom makes all of these offences of universal or quasi-universal jurisdiction<sup>6</sup>. There is ordinarily a requirement that elements of the crime or the context in which it is committed have a transnational character<sup>7</sup>. These crimes are also accompanied by criminal assistance obligations, supported by an *aut judicare*, *aut dedere* obligation<sup>8</sup>. Since this obligation may arise from the mere presence of a suspect in their territories, states which impose a locational double criminality requirement in extradition need to have universal jurisdiction over the crimes so that they would be able to extradite a person to a requesting state which wanted him for an extraterritorial (by its own law) offence<sup>9</sup>. It is far from clear that an exercise of universal jurisdiction by a state on the basis of a transnational criminal treaty would be good against an objecting non-party over one of its nationals<sup>10</sup>. There are extensive obligations about extradition and mutual assistance in each of the conventions<sup>11</sup>. Criminal assistance obligations are discharged under the ordinary law of the requested state, so that nationality obstacles to return or political offence exceptions to return or the provision of mutual assistance still apply (subject to any specific obligation to the contrary in a particular treaty or to any supplementary treaty arrangements which states have made)<sup>12</sup>. With certain exceptions<sup>13</sup>, persons facing removal from the territory of a state would be entitled to any human rights non-refoulement obligation of the requested state<sup>14</sup>.

The offences are offences in national law and trials therefore take place under national criminal law and procedure<sup>15</sup>. Because these laws are not unified, there is the possibility that a trial in one jurisdiction would lead to an acquittal, and a conviction in another. The Conventions have dispute-settlement provisions which may ultimately lead to a dispute being submitted to the International Court of Justice<sup>16</sup>, and while some have provisions for supervision of states' obligation by international organisations, there are no routine mechanisms with binding authority to establish authoritative meaning.

The great bulk of transnational criminal law treaties are counter-terrorism arrangements but the same patterns occur for treaties against drug-trafficking, organized crime<sup>17</sup>, money-laundering<sup>18</sup> and corruption<sup>19</sup>.

Participation is by no means universal, although recent years have seen an increasing number of ratifications of the counter-terrorism treaties under the prompting of the Security Council<sup>20</sup>.

1 Among the treaties of this kind to which the UK is a party are: (1) the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970; Misc 5 (1971); Cmnd 4577) (the 'Hague Convention') (implemented by the Aviation Security Act 1982) (see **AIR LAW** vol 2 (2008) PARAS 14, 624 et seq); (2) the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23

September 1971; Misc 26 (1971); Cmnd 4822) (the 'Montreal Convention') (implemented by the Aviation Security Act 1982) (see **AIR LAW** vol 2 (2008) PARAS 15, 622 et seq); (3) the International Convention against the Taking of Hostages (New York, 18 December 1979; TS 81 (1983); Cmnd 9100) (the 'Hostages Convention') (implemented by the Taking of Hostages Act 1982) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 468); (4) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973; TS 3 (1980); Cmnd 7765) (the 'Attacks on Diplomats Convention') (implemented by the Internationally Protected Persons Act 1978) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 477); (5) the Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994, TS 92 (2000); Cm 4803) (the 'Safety of UN Personnel Convention') (implemented by the United Nations Personnel Act 1997) (see PARA 532); (6) the Convention on Physical Protection of Nuclear Material (Vienna and New York from 3 March 1980; Misc 27 (1980); Cmnd 8112) (the 'Nuclear Material Convention') (implemented by the Nuclear Material (Offences) Act 1983) (see **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARAS 1350, 1583); (7) the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988; TS 64 (1995); Cm 2947) (the 'Safety of Maritime Navigation Convention'); and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, supplementary to the Rome Convention (Rome, 10 March 1988; TS 64 (1995); Cm 2947) (implemented by the Aviation and Maritime Security Act 1990) (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1210 et seq); (8) the International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997; TS 57 (2001); Cm 5347) (the 'Terrorist Bombings Convention') and the International Convention for the Suppression of the Financing of Terrorism (New York, 10 January 2000; TS 28 (2002); Cm 4663) (the 'Terrorist Financing Convention') (implemented by the Terrorism Act 2000); (9) the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988; Misc 14 (1989); Cm 804) (the 'Vienna Convention') (implemented by the Criminal Justice (International Cooperation) Act 1990).

See generally Boister 'Transnational Criminal Law?' (2003) 14(5) European Journal of International Law 953. It should be noted that there is no international crime of 'terrorism'.

2 An exception is the Terrorist Financing Convention, which is directed against financial support for conduct made criminal as a result of obligations under other suppression conventions.

3 I.e. the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 4 February 1985; Misc 12 (1985); Cmnd 9593) (implemented by the Criminal Justice Act 1988 s 134); see PARA 433. Slavery is sometimes said to be a crime against international law but has no settled definition, and there is a crime of slavery in English law, which relies on an international human rights standard to define the conduct criminal in English law: see PARA 434.

4 The offence creating provisions are: (1) the Hague Convention arts 1-3; (2) the Montreal Convention arts 1-4; (3) the Hostages Convention arts 1, 2; (4) the Attacks on Diplomats Convention arts 1, 2; (5) the Safety of UN Personnel Convention arts 1, 9; (6) the Nuclear Material Convention arts 1, 7; (7) the Safety of Maritime Navigation Convention arts 1-3; and Protocol, art 2; (8) the Terrorist Bombings Convention arts 1-3, and the Terrorist Financing Convention arts 1, 2; (9) the Vienna Convention arts 1, 2.

5 See eg (1) the Hague Convention art 4(1) (offence on aircraft registered in its territory; offence on aircraft which lands in its territory; where offence on aircraft leased without crew to a lessee with principal place of business in its territory or, if there is no such place, where the lessee is a permanent resident of the state); (2) the Montreal Convention art 5 (offence committed in state's territory; offence committed on or against an aircraft registered in its territory; when aircraft lands in its territory with offender still on board; where offence on aircraft leased without crew to a lessee with principal place of business in its territory or, if there is no such place, where the lessee is a permanent resident of the state); (3) the Hostages Convention art 5 (offence committed in its territory or on board a ship or aircraft registered in the state; offence committed by any of its nationals; where the offence is committed to compel the state to do or to abstain from doing any act; where the hostage is a national of the state, if the state deems it appropriate); (4) the Attacks on Diplomats Convention art 3 (where the offence is committed in its territory on board a ship or aircraft registered in its territory; when the offender its national; where the internationally protected person enjoys his status by virtue of functions he performs for the state); (5) the Safety of UN Personnel Convention art 10 (where the offence is committed on the state's territory or on board a ship or aircraft registered in its territory; when the offender is a national of the state; and may establish jurisdiction if the offence is committed by a stateless person, habitually resident in the state or a national of the state is the victim or where there is an attempt to compel the state to do or to abstain from doing any act); (6) the Nuclear Material Convention art 8 (where the offence is committed in the state's territory or on board a ship or aircraft registered in its territory; the offender is a national of the state); (7) the Safety of Maritime Navigation Convention art 6 (where offence committed against a ship flying the flag of the state; where the offence is committed within the territory of the state; where the offence is committed by a national of the state; and may establish jurisdiction where the offence is committed by a stateless person who is a habitually resident in the state, where a national of the state is seized, threatened, injured or killed, or the offence is committed to compel the state to do or abstain from doing any act); and Protocol, art 3 (where offence committed against or on board a fixed platform on the state's continental shelf; where the offence is committed by a national of the state; and may establish jurisdiction where the offence is committed by a stateless person habitually resident in the state, a national of the state is seized, threatened injured or killed, or

the offence is committed to compel the state to do or to abstain from doing any act); (8) the Terrorist Bombings Convention art 6 (where the offence is committed on the territory of the state; where the offence is committed on board a ship or aircraft registered in the state; where the offence is committed by a national of the state; and it may establish jurisdiction where the offence is committed against a national of the state, where the offence is committed against a government facility abroad, including an embassy or other diplomatic or consular premises, the offence is committed by a stateless person habitually resident in the state, the offence is committed to compel a state to do or to abstain from doing any act or the offence is committed on board an aircraft operated by the government of the state), and the Terrorist Financing Convention art 7 (offence committed in the territory of the state; offence committed on board a ship or aircraft registered in the state; offence committed by a national of the state; and may establish jurisdiction where the financing offence was directed towards carrying out an offence on the territory or against a national of the state, where the financing offence was directed towards carrying out an offence against a state or government facility abroad, where the financing offence was directed to an offence aimed to compel the state to do or to abstain from doing any act, where it was committed by a stateless person habitually resident in the state or where the offence was committed on an aircraft operated by the government of a state); (9) the Vienna Convention art 4 (offence committed on its territory; offence committed on a ship or aircraft registered in its territory; and may establish jurisdiction where the offence was committed by its national or a person habitually resident in its territory, where the offence was committed on a vessel over which a state was taking action under art 17 or where offence outside its territory was a preparatory or participatory offence with respect to an offence established under the Convention).

6 See eg Aviation Security Act 1982 s 1(1) (and **AIR LAW** vol 2 (2008) PARA 624); Aviation Security Act 1982 s 2(3) (and **AIR LAW** vol 2 (2008) PARA 628); Taking of Hostages Act 1982 s 1(1) (and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 468); Internationally Protected Persons Act 1978 s 1(1) (and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 477); Nuclear Materials (Offences) Act 1983 ss 1-4 (and **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1583); Aviation and Maritime Security Act 1990 ss 9-13 (and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1210); Terrorism Act 2000 ss 62, 63 (and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 470-471); and Criminal Justice (International Cooperation) Act 1990 s 21 (and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1056). As to universal jurisdiction see PARA 227.

7 So that, for example, a purely domestic aircraft hijacking would not fall within the terms of the Hague Convention (see art 3(3)), whereas an attack on a foreign diplomat within a state's territory would be within the ambit of the Attacks on Diplomats Convention (see art 1(1)).

8 See eg (1) the Hague Convention art 7; (2) the Montreal Convention art 7; (3) the Hostages Convention art 8; (4) the Attacks on Diplomats Convention art 7; (5) the Safety of UN Personnel Convention art 14; (6) the Nuclear Material Convention art 10; (7) the Safety of Maritime Navigation Convention art 10; (8) the Terrorist Bombings Convention art 8, and the Terrorist Financing Convention art 10; (9) the Vienna Convention art 6(9).

9 This explains the UK practice of legislating on the basis of universal jurisdiction: see note 7.

10 In *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [1999] UKHL 17, [2000] 1 AC 147, sub nom *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening)* (No 3) [1999] 2 All ER 97, HL, the majority attached importance to the date the Torture Convention (see note 3) had come into force for the states involved (UK, Spain, Chile) before applying the terms of the Criminal Justice Act 1988 (which give effect to the Torture Convention in UK law).

11 See, in general, **EXTRADITION**.

12 See eg the Terrorist Bombing Convention art 11, and the Terrorist Financing Convention art 14 (which exclude offences under the Conventions as being regarded as political offences for the purposes of extradition).

13 See the Hostages Convention art 9 (allowing for a refusal to extradite where there is a risk of discriminatory treatment in the requesting state); and the Terrorist Bombing Convention art 14, and Terrorist Financing Convention art 17 (guaranteeing fair treatment to persons being dealt with under the Conventions including enjoyment of all rights and guarantees in conformity with the law of the state in the territory of which that person is present and applicable provisions of international law, including international human rights law).

14 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 3 (and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 124); *Soering v United Kingdom* A 161 (1989), 11 EHRR 439, ECtHR; Application 37201/06 *Saadi v Italy* (2008) 24 BHRC 123, ECtHR; *Brown v Government of Rwanda* [2009] EWHC 770 (Admin), [2009] All ER (D) 98 (Apr).

15 See eg *R v Abdul-Hussain* [1998] EWCA Crim 3528, [1999] Crim LR 570.

16 See eg *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Provisional Measures)* ICJ Reports 1992, 3.

17 See the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000; TS 12 (2006); Cm 6852); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000; TS 17 (2006); Cm 6881); Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (New York 15 November 2000; TS 16 (2006); Cm 6880).

18 See the United Nations Convention against Transnational Organized Crime (TS 2006, No 12, Cm 6852).

19 See the Criminal Law Convention on Corruption (Strasbourg, 27 Jan 1999; TS 27 (2006); Cm 6958); and the Additional Protocol to the Criminal Law Convention on Corruption (Strasbourg, 15 May 2003).

20 See eg Security Council Resolution 1373 of 28 September 2001.

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**428. Aggression.**

Although it is a crime within the jurisdiction of the International Criminal Court (the 'ICC') there is no definition of the crime of aggression in the Statute of the ICC<sup>1</sup>. Until the term has been defined, there will no definition available for implementation by United Kingdom legislation<sup>2</sup>. It is very unlikely indeed that any other source for a definition of a crime of aggression would be used by Parliament for the purpose of domestic law.

1 See the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999) art 5(2). The ICC exercises jurisdiction over the crime of aggression once a provision is adopted defining the crime and setting out the conditions under which it may exercise jurisdiction over it: see arts 121, 123. The United Kingdom would not in any event be obliged to accept and implement any definition of a crime of aggression ultimately agreed upon: see art 121(5).

2 Crimes under customary international law, including the crime of planning, preparing or waging a war of aggression, are not crimes in English law unless implemented by legislation: *R v Jones*; *Ayliffe v DPP*; *Swain v DPP* [2006] UKHL 16, [2007] 1 AC 136.

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#### 429. Genocide.

Genocide is defined in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide<sup>1</sup> as meaning any of the following acts committed with intent to destroy, in whole or in part<sup>2</sup>, a national, ethnical, racial or religious group<sup>3</sup>:

- 102 (1) killing members of the group<sup>4</sup>;
- 103 (2) causing serious bodily or mental harm to members of the group<sup>5</sup>;
- 104 (3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part<sup>6</sup>;
- 105 (4) imposing measures intended to prevent births within the group<sup>7</sup>;
- 106 (5) forcibly transferring children of the group to another group<sup>8</sup>.

This definition is incorporated into the Statutes of the International Criminal Tribunals for Yugoslavia ('ICTY') and Rwanda ('ICTR')<sup>9</sup>, into the Statute of the International Criminal Court (the 'ICC')<sup>10</sup> and, via the latter, into English law<sup>11</sup>. Genocide is a crime under customary international law and may have been so since as early as 1951<sup>12</sup>, although it may not be prosecuted in English law solely on that account<sup>13</sup>.

The limited definition and specific intent required make genocide a very particular crime, and not all attacks against groups, however serious, will amount to it<sup>14</sup>. Genocide does not cover attacks against political groups, and it is clear that the definition was not intended to encompass the destruction of the elements of a group's cultural identification, ultimately by assimilation ('cultural genocide')<sup>15</sup>.

The specific requirement of intent to destroy in whole or in part means that actions designed to remove large groups of people from a territory ('ethnic cleansing') or acts committed during a conflict which have serious collateral effects on groups will not in themselves amount to genocide<sup>16</sup>. Moreover, the specific intent needs to be shown for everyone accused of genocide, whether as the designer of a policy or as an individual taking part in the execution of a genocidal enterprise. This means that genocide may be committed not only by those who conceive or order the execution of a plan of genocide but by those, however low down or even outside the chain of command, provided that they act with the requisite genocidal intent<sup>17</sup>. These strict rules reflect the perception that genocide is an exceptional crime. However, if genocidal intent cannot be proved, conduct which would satisfy the actus reus of genocide is likely to involve liability for crimes against humanity or war crimes<sup>18</sup>.

The Convention on the Prevention and Punishment of the Crime of Genocide states that genocide, whether committed in time of peace or war, is a crime under international law, which the contracting parties must undertake to prevent and punish<sup>19</sup>. The following acts are punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide<sup>20</sup>.

1 The Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948; TS 58 (1970); Cmd 4421). The Convention was adopted by the United Nations General Assembly on 9 December 1948, and is derived from the concept of crimes against humanity contained in the Charter of the International Military Tribunal (London, 8 August 1945; TS 27 (1946); Cmd 6903) which sat at Nuremberg. The General Assembly declared in General Assembly Resolution 96 (I) of 11 December 1946 that genocide is a crime under international law. The Convention on the Prevention and Punishment of the Crime of Genocide entered into force on 12 January 1951 and for the United Kingdom on 30 January 1970. The principles underlying the Convention are such as are recognised by civilised nations as binding upon states, even without

any conventional obligation: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* ICJ Reports 1951, 15 at 21. See also *A-G for the Government of Israel v Eichmann* (1961) 36 Int LR 5.

2 It is accepted that the 'part' must be substantial, and if not wholly a question of numbers or proportion, then such that the destruction of the part would have an impact on the group as a whole or that its members were of such prominence within the whole group that their preservation was essential to the survival of the group itself: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 198); *Prosecutor v Krstic* Case no IT-98-33-A (judgment, 19 April 2004), ICTY (Appeals Chamber), para 12. The International Court of Justice ('ICJ') concluded that there had been a genocide at Srebrenica, where a 'substantial part' of the group of Bosnian Muslims had been killed with the intention of destroying the group as such: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 296). The ICJ was not persuaded that there had been other genocides in Bosnia: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* at para 376.

3 These terms have no objective definitions and clearly overlap: see *Prosecutor v Krstic* Case no IT-98-33-T (judgment, 2 August 2001), ICTY (Trial Chamber I), paras 555-556; and *Prosecutor v Akayesu* Case no ICTR-96-4-T (judgment, 2 September 1998), paras 512-515, 702. Even on this restricted basis, the identification of any particular group (and establishing that any particular person is a member of it) is not without its difficulties: see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (paras 192-196) (negative definition of the group attacked at Srebrenica as 'non-Serbs' rejected by the ICTY; identified as 'Bosnian Muslims', not any particular segment of that group). The international tribunals have approached the matter by objectively assessing whether the group falls within one or more of these prescribed heads, combined with an assessment of the perpetrators' subjective perceptions: *Prosecutor v Laurent Semanza* Case no ICTR-97-20-T (judgment, 15 May 2003), para 317.

4 See the Convention on the Prevention and Punishment of the Crime of Genocide art II. Given the nature of genocide and the general requirements as to mens rea, killing here means causing deaths intentionally (though in addition, the specific genocidal intent must be shown): see generally the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999) art 30. The fact that genocidal intention is not shown does not mean that a defendant may not be responsible in other ways: see *Prosecutor v Krstic* Case no IT-98-33-A (judgment, 19 April 2004), ICTY (Appeals Chamber) (defendant found guilty of aiding and abetting genocide, while lacking the genocidal intention of a principal). Command responsibility (eg for failing to act to prevent a genocide or punish its perpetrators) may arise in the absence of a genocidal intent on the part of the commander but he would be responsible for genocide: see generally the Statute of the ICC art 28.

5 See the Convention on the Prevention and Punishment of the Crime of Genocide art II. This may include acts of torture, rape, sexual violence or inhuman or degrading treatment: Elements of Crimes art 6(b) para 1 fn 3. As to the Elements of Crimes see PARA 422 note 9. The notion of 'serious' harm does not lend itself to an objective standard but it is a common feature of international standards of ill-treatment, though usually taking into account the characteristics of the victim: see eg *Menesheva v Russia* (2006) 44 EHRR 1162, [2006] ECHR 59261/00. For genocide, the characteristics of the group must be taken into account, although some of the conduct contemplated by this provision is so severe that it would cause the forbidden consequences to any group of people: *A-G for the Government of Israel v Eichmann* (1961) 36 Int LR 5.

6 See the Convention on the Prevention and Punishment of the Crime of Genocide art II. Examples of such conditions include the deliberate deprivation of resources indispensable for survival, such as food or medical services or systematic expulsion from homes: Elements of Crimes art 6(c), para 4 fn 4. As to the Elements of Crimes see PARA 422 note 9. Where 'ethnic cleansing' is the policy being pursued, it is necessary to show that the destruction of the group was intended, not merely its removal from a particular territory by the imposition on it of severe conditions: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 190), citing *Prosecutor v Stakic* Case No IT-97-24-T (judgment, 21 July 2003), ICTY (Trial Chamber), para 519.

7 See the Convention on the Prevention and Punishment of the Crime of Genocide art II. The actions contemplated here clearly include enforced sterilisation and prohibitions upon procreation but they may go further, depending upon certain cultural traditions of a particular group, for instance where rape would exclude women from normal child-bearing. The prohibited sexual conducts which form part of crimes against humanity are a good guide here; in each case, of course, the actus reus would have to be accompanied by the requisite genocidal intent: see PARA 430.

8 See the Convention on the Prevention and Punishment of the Crime of Genocide art II. Children are persons under the age of 18 years: Elements of Crimes art 6(e) para 6. The transfer must take place from their group to another: art 6(e) para 4. Forcibly is not restricted to physical force, and to include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power



against such person or persons or another person, or by taking advantage of a coercive environment: Elements of Crimes, art 6(e), para 1 fn 5. As to the Elements of Crimes see PARA 422 note 9.

9 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993) art 4; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted by the Security Council on 8 November 1994, UN Doc S/RES/955 (1994) art 2.

10 Statute of the ICC art 6.

11 See the International Criminal Court Act 2001 s 50, Sch 8; and PARA 454.

12 See the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* ICJ Reports 1951, 15 at 23.

13 *R v Jones; Ayliffe v DPP; Swain v DPP* [2006] UKHL 16, [2007] 1 AC 136. See also, therefore, the International Criminal Court Act 2001 ss 51(2)(b) (and PARA 454), 67A (not yet in force) (and PARA 454).

14 See the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur UN Doc S/2005/60.

15 *Prosecutor v Krstic* Case no IT-98-33-T (judgment, 2 August 2001), ICTY (Trial Chamber I), para 580; and Case no IT-98-33-A (judgment, 19 April 2004), ICTY (Appeals Chamber), para 25.

16 It is crucial to emphasise the importance of the special intent required for genocide for it is this which gives conduct the special opprobrium which distinguishes genocide from other atrocious behaviour: see eg *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (para 190). 'Destroy' designates physical or biological elimination: *Prosecutor v Krstic* Case no IT-98-33-A (judgment, 19 April 2004), ICTY (Appeals Chamber), para 25.

17 However, knowledge of the required specific intention on the part of others may involve the liability of such persons as accomplices to the principal offenders where other actus reus are present.

18 See eg *Prosecutor v Kupreskic et al* Case no IT-95-16-T (judgment, 14 January 2000), ICTY (Trial Chamber II), para 751 (severe violations of human rights of a population with the object of expelling them the crime against humanity of persecution rather than genocide). See also PARA 430.

19 Convention on the Prevention and Punishment of the Crime of Genocide, art I. The violation of duties under the Convention engages state responsibility rather than individual international criminal responsibility: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports, 26 February 2007 (paras 425-466). The duty to prevent and punish genocide is a peremptory norm of international law and imposes obligations erga omnes: *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility)* ICJ Reports 2006, 6 (para 64); *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 32. As to international responsibility see PARA 327 et seq. As to peremptory norms and obligations erga omnes see PARA 11.

20 Convention on the Prevention and Punishment of the Crime of Genocide, art III. Note that this article was not mentioned in the Statute of the ICC art 6, and consequently not enacted in the International Criminal Court Act 2001.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/14. INTERNATIONAL CRIMINAL LAW/(1) IN GENERAL/430. Crimes against humanity.

#### **430. Crimes against humanity.**

Crimes against humanity were within the jurisdiction of the International Military Tribunal at Nuremberg<sup>1</sup> and were, in a slightly different form, included in the International Law Commission's ('ILC') statement of the Nuremberg Principles<sup>2</sup>. The United Nations Security Council accepted that crimes against humanity were crimes by customary international law in 1993<sup>3</sup>, and again in different terms, the Security Council provided for the jurisdiction of the International Criminal Tribunal for Rwanda ('ICTR') over crimes against humanity<sup>4</sup>.

A more elaborate statement of crimes against humanity is contained in the Statute of the International Criminal Court (the 'ICC')<sup>5</sup> and it is this which has been implemented into English law<sup>6</sup>. For these purposes a crime against humanity means any of the following acts when committed as part of a widespread or systematic attack<sup>7</sup> directed against any civilian population<sup>8</sup>, with knowledge of the attack<sup>9</sup>:

- 107 (1) murder<sup>10</sup>;
- 108 (2) extermination<sup>11</sup>;
- 109 (3) enslavement<sup>12</sup>;
- 110 (4) deportation or forcible transfer of population<sup>13</sup>;
- 111 (5) imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law<sup>14</sup>;
- 112 (6) torture<sup>15</sup>;
- 113 (7) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity<sup>16</sup>;
- 114 (8) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court<sup>17</sup>;
- 115 (9) enforced disappearance of persons<sup>18</sup>;
- 116 (10) the crime of apartheid<sup>19</sup>;
- 117 (11) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health<sup>20</sup>.

In general terms, crimes against humanity may be committed by an official against his own nationals<sup>21</sup> and they may be committed whether or not in the context of an international or internal armed conflict<sup>22</sup>. There must be some element of contextual scale to the attack although individual or relatively limited numbers of acts committed as part of and with knowledge of such an attack may be crimes against humanity<sup>23</sup>. There must be an attack directed at a civilian population, pursuant to or in furtherance of a state or organisational policy to commit such an attack, to distinguish crimes against humanity from high levels of ordinary crime<sup>24</sup>. With the exception of the crime of persecution there is no requirement in general that crimes against humanity be committed on discriminatory grounds; in particular, it is not necessary to show that an individual defendant was acting with a discriminatory intent<sup>25</sup>.

1 Although with the significant limitation that they were committed in execution of or in connection with other crimes within the jurisdiction of the Tribunal: see the Charter of the International Military Tribunal (London, 8 August 1945; TS 27 (1946); Cmd 6903) art 6(c). As to the International Military Tribunal at Nuremberg see PARA 422.

2 See International Law Commission, A/1316 (1950): Nuremberg Principles, principle VI.

3 Ie when the Council conferred jurisdiction on the International Tribunal for the Former Yugoslavia ('ICTY'): see the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993) art 5. This resolution granted the tribunal power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (1) murder; (2) extermination; (3) enslavement; (4) deportation; (5) imprisonment; (6) torture; (7) rape; (8) persecutions on political, racial and religious grounds; (9) other inhumane acts: see art 5. Crimes against humanity are complex and it could be doubted whether any purely customary law definition would satisfy the principle of legality.

4 The International Tribunal for Rwanda ('ICTR') had the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (1) murder; (2) extermination; (3) enslavement; (4) deportation; (5) imprisonment; (6) torture; (7) rape; (8) persecutions on political, racial and religious grounds; (9) other inhumane acts: see the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted by the Security Council on 8 November 1994, UN Doc S/RES/955 (1994) art 3.

5 Ie the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999).

6 See the International Criminal Court Act 2001 s 50; Sch 8; and PARA 454.

7 While 'widespread' or 'systematic' are alternative requirements, the element of an 'attack', suggests that there may be some overlap between them.

8 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts which constitute a crime against humanity (see the text and notes 10-20) against any civilian population, pursuant to or in furtherance of a state or organisational policy to commit such attack: Statute of the ICC art 7(2)(a). 'Civilian' is to distinguish the population from widespread or systematic attacks against military targets, which are governed by international humanitarian law. Attacks on civilian population may also constitute war crimes, however: see art 8(2)(b)(i), (e)(i); and PARA 431.

9 Statute of the ICC art 7(1).

10 Statute of the ICC art 7(1)(a). The required mental element may exclude circumstances in which death results but where the defendant intends only to cause grievous bodily harm, making 'killing' a narrower concept than murder under English law: see art 30.

11 Statute of the ICC art 7(1)(b). 'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population: art 7(2)(b). Extermination is killing, including by inflicting conditions of life calculated to bring about the destruction of part of a population, which is part of the mass killing of members of a civilian population: see the Elements of Crimes art 7(1)(b). As to the Elements of Crimes see PARA 422 note 9. Extermination need not be accompanied by the specific intention required for genocide and covers cases where the targeted group is not one of the four required for genocide: see PARA 429.

12 Statute of the ICC art 7(1)(c). 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children: art 7(2)(c). This is not restricted to reducing persons to chattel slavery but includes similar deprivations of liberty: see Elements of Crimes art 7(1)(c) para 1. It is anticipated that international law definitions of slavery and slavery like practices will be relied upon by the ICC but enslavement may not be so restricted: see the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (7 September 1956; UN TS vol 266 p 3); and the Elements of Crimes art 7(1)(c) para 1 fn 11.

13 Statute of the ICC art 7(1)(d). 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law: art 7(2)(d). This crime covers 'ethnic cleansing' (deportation if across an international boundary, forcible transfer if from one area to another within a state); the removals must be without grounds permitted by international law by expulsion or other coercive acts: see generally Elements of Crimes art 7(1)(d) paras 1, 2. Flight by a population to escape persecution would fall within the

notions of deportation or forcible transfer, whereas voluntary flight to avoid, say, becoming involved in conflicts areas, would not.

14 Statute of the ICC art 7(1)(e). The prohibited conduct is not restricted to confinement in prison and severe deprivation may cover conditions and length of time: see the Elements of Crimes art 7(1)(e) para 1. Deprivation in breach of international law includes the absence or non-application of procedural safeguards to protect against arbitrary confinement.

15 Statute of the ICC art 7(1)(f). 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions: art 7(2)(e). The Statute of the ICC does not adopt in its entirety the definition of torture in the United Nations Convention against Torture (see PARA 433) in that it does not require that the ill-treatment be inflicted for any identified purpose, nor does it restrict torture to acts of or done under the authority or direction of officials, requiring instead that the victims be under the custody or control of the perpetrator: see Elements of Crimes art 7(1)(f) fn 14. Rape may amount to torture and, where the circumstances justify it an allegation of rape should be treated as such. See generally the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 1, General Assembly Resolution 39/46 of 10 December 1984.

16 Statute of the ICC art 7(1)(g). 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy: art 7(2)(f). Rape, which is gender-neutral, is where the perpetrator has invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object of any other part of the body: Elements of Crimes art 7(1)(g)-1 para 1. There is no mention of any purpose associated with the infliction of severe pain or suffering in the statute or in the Elements of Crimes. The penetration must be committed by force or the threat of force or where the perpetrator takes advantage of a coercive environment or the penetration was of a person incapable of giving consent: see the Elements of Crimes art 7(1)(g)-1 para 2. See also *Prosecutor v Kunarac et al* Case No IT-96-23-A, (judgment, 12 June 2002), ICTY (Appeals Chamber), para 129. For rules of evidence specific to cases involving sexual violence see the ICC Rules of Procedure and Evidence (2002), ICC-ASP/1/3, rr 70-71. Sexual slavery requires that the victim be kept in conditions which would satisfy 'enslavement' under the Statute of the ICC art 7(1)(c) (see the text and note 12) and the defendant caused the victim to engage in one or more acts of a sexual nature: Elements of Crimes art 7(1)(g)-2 para 1. Enforced prostitution involves coercion in the same terms as described above for rape where the victim is caused to engage in acts of a sexual nature where the perpetrator or another persons obtained or expected to obtain a financial or other advantage in exchange for the sexual activity: art 7(1)(g)-3 para 2. The definition does not affect national laws relating to pregnancy (meaning those covering abortion): Statute of the ICC art 7(2)(f). The crime of enforced sterilisation is the deprivation of biological reproductive capacity neither justified by medical treatment nor carried out with the victim's consent: see the Elements of Crimes art 7(1)(g)-5 paras 1, 2. The omnibus offence of other sexual violence of comparable gravity relies on the definition of coercion for rape to cause acts of sexual nature comparable to those specifically condemned, a term which must be interpreted carefully to avoid complaints of vagueness: see generally art 7(1)(g)-6.

17 Statute of the ICC art 7(1)(h). 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity: art 7(2)(g). 'Persecution' has close affinities with genocide, save that there is no requirement to show genocidal intent: as to which see PARA 429. See also *Prosecutor v Kupreskic et al* Case No IT-95-16-T (judgment, 14 January 2000), ICTY (Trial Chamber II), para 580. The objection is that the condition appears to return to something like the limitation in the Nuremberg Charter but there can be no legal objection to conferring on the Tribunal a narrower jurisdiction than customary law might have permitted. Persecution includes destruction of property, where the property attacked was chosen on discriminatory grounds: *Prosecutor v Blaskic* Case No IT-95-14-T (judgment, 3 March 2000), ICTY (Trial Chamber), para 233.

18 Statute of the ICC art 7(1)(i). 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a state or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time: art 7(2)(i). The definition of the crime of enforced disappearance is taken from United Nations General Assembly Resolution 47/133 of 18 December 1992, and is itself further incorporated in the International Convention for the Protection of All Persons from Enforced Disappearance 2006 (General Assembly Resolution 61/177 of 20 December 2006; 14 IHRR 582 (2007)) (not yet in force; and the United Kingdom is not a signatory). It is a complex crime involving the arrest, detention or abduction of a person and the refusal to acknowledge that this has happened or to give information about the person's whereabouts, and it must have been carried out by or with the authorisation, support or acquiescence of a state or political organisation: see the Elements of Crimes art 7(1)(i) paras 1-5. The perpetrator must have intended to remove the person from the protection of the law for a prolonged period of time: art 7(1)(i) para 6. It is likely that more than one person would have been responsible for different element of the crime but involvement in one of them with the

requisite knowledge and intention is sufficient: art 7(1)(i) para 8. International human rights law establishes that enforced disappearance violates the rights of the family and close friends of the persons 'disappeared' but the crimes committed against them are more likely to have been torture or inhuman treatment: *Kurt v Turkey* [1998] ECHR 24276/94, 5 BHRC 1.

19 Statute of the ICC art 7(1)(j). 'The crime of apartheid' means inhumane acts of a character similar to those referred to in para 1 (see the text and notes 10-20), committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime: art 7(2)(h). The definition of the crime of apartheid is a modification of the definition provided in the International Convention for the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973), which was directed at the system in South Africa.

20 Statute of the ICC art 7(1)(k). While all definitions of crimes against humanity have a residual clause to cover other serious ill-treatment beyond that specifically prohibited, the principle of legality requires that there be a close identity between any conduct falling within this head and the other heads of prohibited conduct: see the Elements of Crimes art 7(1)(k) para 2. While the defendant must be aware of the factual nature of his conduct which gives it its inhumane character, he does not need to have made a subjective assessment of it those terms: see art 7(1)(k) para 3. The experiences of the ICTY and ICTR have demonstrated the importance of the residual clause, even though the catalogue of prohibited conduct in the Statute of the ICC has been extended to take into account some of the practices which came before those tribunals.

21 This was the great innovation of the Charter of the International Military Tribunal (London, 8 August 1945; TS 27 (1946); Cmd 6903) and makes it possible to treat grave violations of human rights by state officials against their own populations as crimes against international law.

22 Previous definitions which stipulate a link between crimes against humanity and armed conflict are regarded as jurisdictional limitations on the wider notion of crimes against humanity in customary international law: *Prosecutor v Tadic* Case No IT-94-1-A (judgment, 15 July 1999) ICTY (Appeals Chamber), paras 282-288.

23 *Prosecutor v Kunarac et al* Case No IT-96-23-A, (judgment, 12 June 2002), ICTY (Appeals Chamber), para 96; *Prosecutor v Tadic* Case No IT-94-1-A (judgment, 15 July 1999) ICTY (Appeals Chamber), para 248.

24 It has been suggested that the requirement of state policy or encouragement of the attack goes beyond what customary international law requires by excluding acquiescence of officials in the acts of private individuals from the ambit of crimes against humanity, A Cassese, 'Crimes against Humanity' in A Cassese et al, I *The Rome Statute of the International Criminal Court: A Commentary* (2002).

25 See *Prosecutor v Akayesu* ICTR 96-1-A (judgment, 1 June 2001) (Appeals Chamber), paras 461-469.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/14. INTERNATIONAL CRIMINAL LAW/(1) IN GENERAL/431. International standards for war crimes.

#### **431. International standards for war crimes.**

The International Military Tribunal at Nuremberg held that breaches of some treaty-based provisions of the law of war, which were not explicitly made criminal offences by the treaties themselves, were criminal by customary international law<sup>1</sup>. The Geneva Conventions 1949, established a category of 'grave breaches' of their provisions, which engage individual criminal responsibility<sup>2</sup>, and which may be committed only in an international armed conflict<sup>3</sup>. States are obliged to make grave breaches crimes within their national law, with universal jurisdiction, and to seek out those accused of grave breaches and bring them to trial or extradite them<sup>4</sup>. Additional Protocol I, which was added to the Geneva Conventions 1949 in 1977, added to the list of grave breaches<sup>5</sup>.

War crimes, both 'grave breaches' and breaches of the laws and customs of war<sup>6</sup>, are part of the jurisdiction of the International Criminal Tribunal for Yugoslavia ('ICTY')<sup>7</sup>. The conflicts in Yugoslavia were international and internal, and although there are some standards applicable to internal armed conflicts in the Geneva Conventions 1949 and Additional Protocol II (which applies specifically to internal armed conflicts), violation of these provisions is not specifically made criminal<sup>8</sup>. The conflict in Rwanda was a wholly internal armed conflict and the jurisdiction of the International Criminal Tribunal for Rwanda ('ICTR') includes crimes committed in the internal armed conflict<sup>9</sup>. Perhaps partly because of this provision the ICTY has held that some conduct in internal armed conflicts is criminal by customary international law and fell within the tribunal's jurisdiction<sup>10</sup>. These developments reflect a view that the criminal law applicable to international armed conflicts and that which applies to internal armed conflicts are converging. However, it appears that there has not been a complete assimilation of the two bodies of law.

War crimes<sup>11</sup> are defined in the Statute of the International Criminal Court (the 'ICC')<sup>12</sup> as:

- 118 (1) grave breaches of the Geneva Conventions 1949<sup>13</sup>;
- 119 (2) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law<sup>14</sup>;
- 120 (3) in the case of an armed conflict not of an international character, serious violations of certain acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause<sup>15</sup>;
- 121 (4) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law<sup>16</sup>.

Head (3) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature<sup>17</sup>. Head (4) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature; it applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups<sup>18</sup>.

1 See the Judgment of the International Military Tribunal for the Trial of the Major War Criminals (1946; Misc 12 (1946); Cmd 6964) at pp 64-65. War Crimes came within the jurisdiction of the tribunal and were defined as violations of the laws or customs of war, including, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity: see the Charter of the International Military Tribunal (London, 8 August 1945; TS 27 (1946); Cmd 6903) art 6(b). As to the International Military Tribunal at Nuremburg see PARA 422.

2 See the Geneva Conventions 1949: (1) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949; TS 39 (1958); Cmd 550) art 50; (2) the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Geneva, 12 August 1949; TS 39 (1958); Cmd 550) art 51; (3) the Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949; TS 39 (1958); Cmd 550) art 130; and (4) the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949, TS 39 (1958); Cmd 550) art 147. As to grave breaches see also **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 424.

3 See the Geneva Conventions 1949 (see note 2), common art 2.

4 See the Geneva Conventions 1949 (see note 2): (1) art 49; (2) art 50; (3) art 129; and (4) art 146.

5 See the Protocol, additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts done on 10 June 1977 (Geneva, 12 December 1977; Misc 19 (1977); Cmd 6927) ('Protocol I') arts 11, 85. Wars of national liberation are within the concept of 'international armed conflict': see art 1(4).

6 ICTY has the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (1) wilful killing; (2) torture or inhuman treatment, including biological experiments; (3) wilfully causing great suffering or serious injury to body or health; (4) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (5) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (6) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (7) unlawful deportation or transfer or unlawful confinement of a civilian; (8) taking civilians as hostages: see the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ('ICTY'), UN Doc S/25704 at 36, annex (1993) and S/25704/Add 1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993) art 2.

ICTY also has the power to prosecute persons violating the laws or customs of war, including, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property: art 3.

7 See PARA 423 note 3.

8 See the Geneva Conventions 1949 (see note 2), common art 3; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflict done on 10 June 1977 (Geneva, 12 December 1977; Misc 19 (1977); Cmd 6927) ('Protocol II').

9 ICTR has the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977, including, but not be limited to: (1) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (2) collective punishments; (3) taking of hostages; (4) acts of terrorism; (5) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (6) pillage; (7) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples; (8) threats to commit any of the foregoing acts: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ('ICTR'), adopted by the Security Council on 8 November 1994, UN Doc S/RES/955 (1994) art 4. As to ICTR see PARA 423 note 3.

10 See *Prosecutor v Tadic* Case No IT-94-1-AR72 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995), ICTY (Appeals Chamber), paras 126-130. Note *Prosecutor v Kanyabashi* Case No ICTR-96-15-T (Decision on the Defence Motion of Jurisdiction, 18 June 1997), ICTR (Trial Chamber), para 8.

11 As to war crimes see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 463 et seq.

12 In the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999).

13 Namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (1) wilful killing; (2) torture or inhuman treatment, including biological experiments; (3) wilfully causing great suffering, or serious injury to body or health; (4) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (5) compelling a prisoner of war or other protected person to serve in the forces of a hostile power; (6) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (7) unlawful deportation or transfer or unlawful confinement; (8) taking of hostages: Statute of the ICC art 8(2)(a).

14 Namely, any of the following acts: (1) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (2) intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (3) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the United Nations Charter, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (4) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (5) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (6) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion; (7) making improper use of a flag of truce, or of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; (8) the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; (9) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (10) subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (11) killing or wounding treacherously individuals belonging to the hostile nation or army; (12) declaring that no quarter will be given; (13) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; (14) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; (15) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war; (16) pillaging a town or place, even when taken by assault; (17) employing poison or poisoned weapons; (18) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (19) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (20) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition; (21) committing outrages on personal dignity, in particular humiliating and degrading treatment; (22) committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; (23) utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; (24) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (25) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions; (26) conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities: Statute of the ICC art 8(2)(b). Note that art 8(2)(b)(20) has not been enacted in the International Criminal Court Act 2001; as to which see PARA 437 et seq.

15 Namely, any of the following acts: (1) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (2) committing outrages on personal dignity, in particular humiliating and degrading treatment; (3) taking of hostages; (4) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable: Statute of the ICC art 8(2)(c).



16 Namely, any of the following acts: (1) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (2) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (3) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the United Nations Charter, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (4) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (5) pillaging a town or place, even when taken by assault; (6) committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and any other form of sexual violence also constituting a serious violation of the Geneva Conventions; (7) conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities; (8) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; (9) killing or wounding treacherously a combatant adversary; (10) declaring that no quarter will be given; (11) subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (12) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict: Statute of the ICC art 8(2)(e).

17 Statute of the ICC art 8(2)(d). Nothing in art 8(2)(c), (d) affects the responsibility of a government to maintain or re-establish law and order in the state or to defend the unity and territorial integrity of the state, by all legitimate means: art 8(3). Note that art 8(3) has not been enacted in the International Criminal Court Act 2001; as to which see PARA 437 et seq.

18 Statute of the ICC art 8(2)(f).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/14. INTERNATIONAL CRIMINAL LAW/(1) IN GENERAL/432. War crimes, United Kingdom jurisdiction and the temporal element.

#### **432. War crimes, United Kingdom jurisdiction and the temporal element.**

The International Criminal Courts Act 2001 is the principal basis for the exercise of criminal jurisdiction in the United Kingdom over international crimes, and the substantive definitions of war crimes are taken directly from the Statute of the International Court of Justice (the 'ICC')<sup>1</sup> and accordingly cover conduct in international and internal armed conflicts<sup>2</sup>.

Grave breaches of the Geneva Conventions 1949, and of Additional Protocol I are offences of universal jurisdiction in English law<sup>3</sup>. This fact remains important for two reasons, each deriving from the claim of universal jurisdiction over grave breaches offences<sup>4</sup>. The first is that the Geneva Conventions 1949 are widely ratified and apply to many more states than are parties to the Statute of the ICC, so that very few states could object to the exercise of extraterritorial jurisdiction by the United Kingdom courts over acts of their nationals. The second is that the Statute of the ICC and the International Criminal Court Act 2001 do not rely on universal jurisdiction but on jurisdiction based on territory or nationality (and, in the case of the International Criminal Court Act 2001, on residence)<sup>5</sup>. Therefore, the possibility remains that there may be an individual, a national of a party to the Statute of the ICC, who is in the United Kingdom but suspected of war crimes on the territory of a third state. Whether to be able to exercise jurisdiction in the United Kingdom or to be able to extradite such a person to a third state, it is necessary that the United Kingdom has universal jurisdiction over the offence, which, for war crimes, it could find under the Geneva Conventions Act 1957.

The War Crimes Act 1991 provides for a particular jurisdiction in the United Kingdom courts in cases of homicide committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation, regardless of the nationality of the defendant at the time of the offence, where the conduct constituted also a violation of the laws and customs of war<sup>6</sup>. Only one conviction has been obtained under this legislation but it creates a jurisdiction in the courts to try those accused of conduct amounting a crime under international law which would not be available otherwise<sup>7</sup>.

Criminality in customary international law is not a basis for founding a criminal offence in English law<sup>8</sup>, so the possibility of a prosecution for war crimes will depend upon the enactment of a statute making the international offences in English law. In the ordinary way, the offences would operate from the date of the coming into force of the statute, although provision may be made to give them retrospective effect<sup>9</sup>.

<sup>1</sup> See the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999); and see PARA 437

<sup>2</sup> See the International Criminal Court Act 2001 ss 50, 51; and PARA 454.

<sup>3</sup> See the Geneva Conventions Act 1957 s 1; and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 424. As to the Geneva Conventions 1949 see PARA 431 note 2. As to the Additional Protocol see PARA 431 note 5.

<sup>4</sup> As to universal jurisdiction see PARA 227.

<sup>5</sup> See the International Criminal Court Act 2001 ss 51, 67; and PARA 454. The International Criminal Court Act 2001 provides in addition extraterritorial jurisdiction over the acts of those subject to UK service jurisdiction: see s 67(3); and PARA 454.

<sup>6</sup> See the War Crimes Act 1991 s 1(1); and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 465.

- 7 See *R v Sawoniuk* [2000] 2 Cr App Rep 220, [2000] All ER (D) 154, CA.
- 8 See *R v Jones; Ayliffe v DPP; Swain v DPP* [2006] UKHL 16, [2007] 1 AC 136.
- 9 See the International Criminal Court Act 2009 s 65A (not yet in force); and PARAS 454-455, 458.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/14. INTERNATIONAL CRIMINAL LAW/(1) IN GENERAL/433. Torture.

### 433. Torture.

Torture is an international crime under customary international law, although its exact lineaments are elusive<sup>1</sup>. Torture simpliciter is not a crime within the jurisdiction of any international tribunal but, in the appropriate contexts, it may be prosecuted as a crime against humanity or as a war crime<sup>2</sup>.

The United Kingdom is a party to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984<sup>3</sup>, and has implemented that Convention in domestic law<sup>4</sup>. For these purposes torture is defined as severe pain or suffering inflicted on another by or at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity<sup>5</sup>. Torture in this sense was not a crime in English law until the implementing statute came into force and it is possible that the extraterritorial jurisdiction provisions may be limited to United Kingdom nationals and nationals of states party to the Convention<sup>6</sup>.

It is a defence for a person charged with the offence of torture in the United Kingdom to prove that he had lawful authority, justification or excuse<sup>7</sup>. The Convention contains an *aut judicare aut derere obligation*<sup>8</sup>. There is a specific non-refoulement obligation with respect to those accused of torture who themselves face a risk of torture if returned to a particular jurisdiction<sup>9</sup>. Torture being an offence which may be committed only by officials or under the direction of officials is an offence for which immunity *ratione materiae* may not be claimed in English law<sup>10</sup>, although immunity *ratio personae* may be<sup>11</sup>.

1 *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 at 198, sub nom *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening) (No 3)* [1999] 2 All ER 97 at 108, HL per Lord Browne-Wilkinson: 'I have no doubt that long before the Torture Convention of 1984, torture was an international crime in the highest sense'. In *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221, [2006] 1 All ER 575 it was held that torture was prohibited at common law but there is no crime of that name and no extraterritorial jurisdiction over crimes, such as grievous bodily harm, which might cover conduct otherwise understood to be torture.

2 See eg the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999, arts 7(1)(f) (crimes against humanity; see PARA 430), 8(2)(a)(ii), 8(2)(c)(i) (war crimes; see PARA 431).

3 *Ie* the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 4 February 1985; Misc 12 (1985); Cmd 9593) (the 'Torture Convention'). There is an optional protocol to the Convention (to which the UK is not a party) which gives jurisdiction to the Committee on Torture established under the Convention to hear individual applications: see UN General Assembly Resolution 57/199 of 18 December 2002. See generally Nowak and McArthur *The United Nations Convention against Torture: a Commentary* (2008).

4 *Ie* under the Criminal Justice Act 1988 ss 134-138: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 160. The Convention is concerned with more than the criminalisation and prosecution of torture but the UK has given effect to the criminalisation provisions of the Convention.

5 See the Torture Convention art 1(1); Criminal Justice Act 1988 s 134(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 160.

6 The UK government has made torture an offence of universal jurisdiction: see the Criminal Justice Act 1988 s 134; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 160. See also *R v Zardad* [2007] EWCA Crim 279, [2007] All ER (D) 90 (Feb) (conviction of an Afghan national for acts of torture and hostage-taking in Afghanistan). The Torture Convention itself requires only that states must take jurisdiction over acts within their territory and acts of its nationals and allows jurisdiction where a national of the state has been a victim of torture abroad: see art 5(1).

7 See the Torture Convention art 1(1); the Criminal Justice Act 1988 s 134(5); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 160. Note also the Secretary of State's power to authorise acts of intelligence officers outside the UK which would otherwise be offences in UK law: see the Intelligence Services Act 1994 s 7(1); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 474.

8 States are required to prosecute or extradite torturers in their custody: see the Torture Convention art 5. In order that the UK has the option to prosecute or to satisfy double criminality requirements for extradition in all cases, it is necessary that torture be a crime of universal jurisdiction in UK law: see the text and note 6.

9 See the Torture Convention art 3. This obligation overlaps with the obligation under the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969; ETS no 5) art 3: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 124.

10 *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, sub nom *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening) (No 3)* [1999] 2 All ER 97, HL.

11 A serving head of state was granted immunity *ratione personae* against the issue of an arrest warrant on an accusation of torture: see *Re Mugabe* (7 January 2004, unreported), Bow Street Magistrates' Court, judgment reproduced in Warbrick 'Immunity and International Crimes in English Law' (2004) 53 ICLQ 769.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/14. INTERNATIONAL CRIMINAL LAW/(1) IN GENERAL/434. Slavery.

#### 434. Slavery.

Slavery and the slave trade are probably crimes under customary international law, although their exact identification is difficult and any definition narrow compared with the widespread manifestations of exploitation which fall short of slavery and which are covered by the term 'servitude'<sup>1</sup>. The obligation on a state not to engage in or make possible slavery is an obligation erga omnes<sup>2</sup>, and there is no specific treaty obligation which requires states to make slavery a crime or which specifically acknowledges the international criminality of slavery.

Slavery is prohibited by human rights treaties and the forbidden practices are extended to cover servitude and, with certain qualifications, forced or compulsory labour<sup>3</sup>. The European Convention on Human Rights contains an implied positive obligation on states to criminalise slavery and servitude but this obligation extends only where the victims are within the territory or the jurisdiction of party states<sup>4</sup>.

'Enslavement' may, in the appropriate context, amount to a crime against humanity<sup>5</sup>. As from a day to be appointed 'slavery' is a crime in English law, drawing its definition from international human rights law, although with no extraterritorial extension at all<sup>6</sup>.

1 'Slavery' is understood as 'chattel slavery' in which one person exercises rights of property over the person of another. Exploitation without ownership is 'servitude'.

2 See *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3 at 32; and PARA 11. The rule prohibiting slavery is a rule of ius cogens: see the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA'), Pt 1, Ch V, International Law Commission Report, 53rd Session, A/56/10, YILC 2001, vol II(2) art 26, and the Commentary to Article 26 para (5); and PARA 362.

3 See the International Covenant on Civil and Political Rights (New York, 16 December 1966; ratified by the United Kingdom 20 May 1976; TS 6 (1977): Cmnd 6702) art 8.

4 See the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969; ETS no 5) art 4: and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 125.

5 See the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999, arts 7(1)(c) (crimes against humanity; see PARA 430).

6 See the Coroners and Justice Act 2009 s 71 (not yet in force).

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/14. INTERNATIONAL CRIMINAL LAW/(1) IN GENERAL/435. Immunities and international criminal law.

#### **435. Immunities and international criminal law.**

Specifically or by implication, it is established that immunities in international law *ratione materiae* may not be relied on before international criminal tribunals<sup>1</sup>. Where the tribunal is established by a United Nations Security Council resolution, this applies to all members of the United Nations<sup>2</sup>. Where the tribunal is established by treaty, the non-application of any immunity is limited to officials of parties to the treaty<sup>3</sup>.

It remains unresolved whether or not a person entitled to immunity *ratione personae* would be entitled to benefit from that immunity before an international tribunal. For a Security Council tribunal it seems that the immunity will be inapplicable<sup>4</sup>. For a tribunal based on treaty, the terms of the treaty will determine the question<sup>5</sup>. Where the treaty does not clearly resolve the matter, the implication should be drawn that nationals of parties to the treaty may not rely on the immunity but that nationals of non-parties might do so<sup>6</sup>.

Before national courts, two situations arise: a national prosecution or extradition proceedings to another state, and the transfer of the defendant requested by an international tribunal. Generally, in a national trial or extradition proceedings, immunities apply in the ordinary way so that no proceedings would be lawful against those entitled to a personal or material immunity<sup>7</sup>. However, treaty obligations may limit the effect of immunities<sup>8</sup>. It has been argued that material immunity will not protect a person charged with any crime against international law (in the same way as it does not before an international tribunal) but there is no English authority to this effect. Where an international tribunal seeks the transfer of a defendant, there will be no immunity of any kind if the tribunal is established by the Security Council<sup>9</sup>. If the tribunal is established by treaty, the terms of the treaty will determine the matter for parties to the treaty. Persons claiming immunity by reason of a connection with a non-party will be entitled to rely on their immunity<sup>10</sup>.

1 For immunities in international law see PARA 242 et seq. See *Prosecutor v Blaskic* Case No IT-95-14-A (judgment, 29 July 2004), ICTY (Appeals Chamber), para 78. Uncertainties arise because of the broad language in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002, 3 at 23, 25 (paras 56, 61).

2 As to the primacy of the Charter of the United Nations see the Charter of the United Nations (San Francisco 25 June 1945; TS 67 (Cmd 7015) art 103; and PARA 10. In the event of a conflict between the obligations of members of the United Nations under the present Charter and their obligations under any other international agreement, the present Charter prevails: see PARA 10.

3 Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999) art 98(1).

4 See the Charter of the United Nations art 103; and PARA 10. See also *Prosecutor v Milosevic (Decision on Preliminary Motions)* Case No IT-99-37-PT (8 November 2001) ICTY. See also note 9.

5 See eg the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999) art 27(2).

6 But for the contrary conclusion see *Prosecutor v Charles Taylor (Decision on Immunity from Jurisdiction)* SCSL-2003-01-I-059, Special Court of Sierra Leone (Appeals Chamber).

7 *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3) (Amnesty International intervening)* [2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827 per Lord Millett; and see (dealing with

Mugabe as a serving President, and Mofaz, as a serving Defence Minister), Warbrick 'Immunity and International Crimes in English Law' (2004) 53 ICLQ 769.

8 *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3) (Amnesty International intervening)* [2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827 (the judgments rely on the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 to find that there was no immunity *ratione materiae* for an ex-Head of State, such that the denial of immunity applied only to conduct after the Convention was in force for the states involved).

9 *Prosecutor v Milosevic (Decision on Preliminary Motions)* Case No IT-99-37-PT (8 November 2001) ICTY; *Prosecutor v Kambanda* Case No ICTR-97-23-S (judgment, 4 September 1998).

10 See eg the International Criminal Court Act 2001 s 23; and PARA 446. See also International Criminal Court (Darfur) Order, SI 699/2009, precluding any state or diplomatic immunity from preventing proceedings under the International Criminal Court 2001 arising as a result of the reference to the ICC by the Security Council of the situation in Darfur by Security Council Resolution 1593 of 31 March 2005.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/14. INTERNATIONAL CRIMINAL LAW/(1) IN GENERAL/436. Co-operation.

#### **436. Co-operation.**

States have different co-operation obligations towards other states, and towards international tribunals.

Co-operation with other states may involve the extradition of persons for trial in another state or various forms of mutual assistance. Prima facie, the United Kingdom will rely on its ordinary extradition processes to secure the return of a person wanted by another state to face charges of having committed crimes against international law<sup>1</sup>. Crimes within the jurisdiction of the International Criminal Court (the 'ICC') are on the European Framework List for the purposes of extradition in the United Kingdom<sup>2</sup>, and the double criminality rule does not apply for requests for international offences<sup>3</sup>. Crimes against international law are extradition crimes<sup>4</sup>. Where there is no extradition treaty or arrangement between the United Kingdom and the requesting state, the government may agree special extradition arrangements with that state<sup>5</sup>. The ordinary bars to extradition<sup>6</sup> apply to requests for international crimes<sup>7</sup>. The defendant will be able to resist extradition if he can show that his removal would give rise to substantial evidence of a real risk of a violation of a fundamental right under the European Convention on Human Rights<sup>8</sup>.

Co-operation with international tribunals depends upon the legal basis for the creation of the tribunal and the particulars of the instruments establishing each tribunal, which may include specific provisions of a tribunal's rules as well as its constitutive instrument. Discharge of obligations of co-operation with international tribunals requires legislation, and regulations have been made to ensure co-operation with the international tribunals in the former Yugoslavia ('ICTY') and Rwanda ('ICTR')<sup>9</sup>. Established under the United Nations Charter, the powers of these tribunals take priority over any other international obligations of the members of the United Nations and apply to all members of the United Nations<sup>10</sup>. While not disallowing proceedings in national courts against defendants on charges which fall within their jurisdiction these tribunals have 'primacy' over domestic proceedings, which means that the tribunal may require that national proceedings be terminated and the defendant transferred<sup>11</sup>.

Co-operation with the International Criminal Court (the 'ICC') is governed by the terms of its statute<sup>12</sup> and the necessary powers are conferred by the International Criminal Court Act 2001<sup>13</sup>. The obligations of parties to the statute are less peremptory than those under the statutes of the tribunals for Yugoslavia and Rwanda, and the ICC operates under the principle of 'complementarity', which is to say that a case will be inadmissible before the ICC unless it can be shown that a state is unable or unwilling to proceed with an investigation and prosecution<sup>14</sup>.

The United Kingdom has additionally accepted obligation with regard to the Special Court for Sierra Leone<sup>15</sup>.

1 See generally **EXTRADITION**.

2 See the Extradition Act 2003 Sch 2.

3 See the Extradition Act 2003 s 196; and **EXTRADITION** vol 17(2) (Reissue) PARA 1163.

4 For the purposes of category 2 territories: see the Extradition Act 2003 s 137(5), (6); and **EXTRADITION** vol 17(2) (Reissue) PARA 1451. As to the meaning of 'category 2 territory' see **EXTRADITION** vol 17(2) (Reissue) PARA 1447.

5 See the Extradition Act 2003 s 194; and **EXTRADITION** vol 17(2) (Reissue) PARA 1163. As to the memorandum of understanding with Rwanda for the return of defendants to face genocide charges see *Brown v Government of Rwanda* [2009] EWHC 770 (Admin), [2009] All ER (D) 98 (Apr), at [4].

6 le in the Extradition Act 2003 ss 11-21, 79-87; see **EXTRADITION**.

7 See the Extradition Act 2003 s 11; and **EXTRADITION** vol 17(2) (Reissue) PARA 1412.

8 See *Soering v United Kingdom* (1989) 11 EHRR 439 at para 88; and *Brown v Government of Rwanda* [2009] EWHC 770 (Admin), [2009] All ER (D) 98 (Apr), at [119]-[121] (where the principle was confirmed even in the face of requests for persons to face charges of genocide). The European Convention on Human Rights means the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969; ETS no 5): see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 122.

9 See the United Nations (International Tribunal) (Former Yugoslavia) Order 1996, SI 1996/716; the United Nations (International Tribunal) (Rwanda) Order 1996, SI 1996/1296; and **EXTRADITION** vol 17(2) (Reissue) PARA 1163. See also the International Criminal Court Act 2001 s 77.

10 le established under Chapter VII of the Charter of the United Nations: see the Statute of the ICTY, preamble; and the Statute of the ICTR, preamble. As to the Charter see PARA 10.

11 As to ICTY see the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993) art 9(2); and the United Nations (International Tribunal) (Former Yugoslavia) Order 1996, SI 1996/716, art 14. As to ICTR see Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted by the Security Council on 8 November 1994, UN Doc S/RES/955 (1994) art 8(2); and United Nations (International Tribunal) (Rwanda) Order 1996, SI 1996/1296, art 14. Tharcisse Muvunyi, the only person wanted by either Tribunal who was found within the United Kingdom, agreed to his transfer to the Rwanda Tribunal: see generally *Prosecutor v Muvunyi* Case No ICTR-2000-55.

12 See the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998) 999), Pt 9: International Cooperation and Judicial Assistance; and art 59.

13 See the International Criminal Court Act 2001, Pts 2, 3 and 4; and PARA 437 et seq.

14 The ICC determines that a case is inadmissible where: (1) the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution; (2) the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute; (3) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the ICC is not permitted; (4) the case is not of sufficient gravity to justify further action by the ICC: Statute of the ICC art 17(1). In order to determine unwillingness in a particular case, the ICC must consider, having regard to the principles of due process recognised by international law, whether one or more of the following exist, as applicable: (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court; (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice: art 17(2).

In order to determine inability in a particular case, the court must consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings: art 17(3).

The International Criminal Court Act 2001 adopts the definition of the offences for the purposes of national law in the same terms as the statute, takes the same jurisdictional basis as apply to the ICC and has modified the general part of English criminal law where it differs significantly to bring it into line with the provisions of the ICC Statute (see PARA 437 et seq). Investigations and prosecutions under national law should, therefore, satisfy the Statute of the ICC's standard of complementarity and allow the pre-emption of cases with a UK element from being admissible before the ICC.

15 Her Majesty may by Order in Council make in relation to the Special Court for Sierra Leone provision having effect in England and Wales, and corresponding to that made in relation to the ICC by the International

Criminal Court Act 2001 ss 42-48 (see PARA 450 et seq) (enforcement of sentences of imprisonment), with any necessary modifications: the International Criminal Court Act 2001 s 77A(1) (added by the International Tribunals (Sierra Leone) Act 2007 s 1. The International Tribunals (Sierra Leone) (Application of Provisions) Order 2007, SI 2007/2140, have been so made. The United Kingdom government's obligation is, in particular, to take into custody Charles Taylor, the ex-President of Liberia, if he be convicted by the Special Court for Sierra Leone.

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## **(2) CO-OPERATION WITH THE INTERNATIONAL CRIMINAL COURT**

### **(i) Introduction**

#### **437. The International Criminal Court.**

The International Criminal Court (the 'ICC') has international jurisdiction over persons with respect to: (1) genocide; (2) crimes against humanity; (3) war crimes; and (4) crimes of aggression<sup>1</sup>. The court's proceedings are governed by the ICC Statute, which has been given effect in the United Kingdom<sup>2</sup>.

1 See the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998), 999) (the 'ICC Statute') art 5(1). See also **EXTRADITION** vol 17(2) (Reissue) PARA 1164.

2 The International Criminal Court Act 2001 gives effect to the ICC Statute, as to which see PARA 437 et seq. As to the International Criminal Court Act 2001 see PARAS 438-458. See also **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 463. As to the meaning of 'United Kingdom' see PARA 30 note 3.

By virtue of the International Criminal Court Act 2001 Sch 1 para 1 (amended by the International Organisations Act 2005 ss 6, 9, Schedule) and the International Criminal Court (Immunities and Privileges) (No 1) Order 2006, SI 2006/1907, the legal capacities of a body corporate are conferred on the International Criminal Court, and privileges and immunities are conferred on its judges, the prosecutor, the deputy prosecutors, the registrar, the deputy registrar, the staff of the office of the prosecutor, the staff of the registry, counsel, experts, witnesses and certain other persons.

Provision is made for the International Criminal Court Act 2001 to be extended to any of the Channel Islands, the Isle of Man or any colony: see s 79(3). Certain provisions have been extended, with modifications, to the Isle of Man: see the International Criminal Court Act 2001 (Isle of Man) Order 2004, SI 2004/714. Certain provisions have been extended, with adaptations and modifications, to the following overseas territories: Anguilla; Bermuda; Cayman Islands; Falkland Islands; Montserrat; Pitcairn, Henderson, Ducie and Oeno Islands; St Helena and its Dependencies; Sovereign Base Areas of Akrotiri and Dhekelia; Turks and Caicos Islands; Virgin Islands: see the International Criminal Court Act 2001 (Overseas Territories) Order 2009, SI 2009/1738.

### **UPDATE**

#### **437 The International Criminal Court**

NOTE 2--SI 2009/1738 amended: SI 2010/763.

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## **(ii) Arrest and Surrender of Persons**

### **438. Procedure on request for arrest and delivery up.**

Where the Secretary of State<sup>1</sup> receives a request from the International Criminal Court (the 'ICC')<sup>2</sup> for the arrest and surrender of a person alleged to have committed an ICC crime<sup>3</sup>, or to have been convicted by the ICC, he must transmit the request and the documents accompanying it to an appropriate judicial officer<sup>4</sup>. If the request is accompanied by a warrant of arrest and the appropriate judicial officer is satisfied that the warrant appears to have been issued by the ICC<sup>5</sup>, he must indorse the warrant for execution in the United Kingdom<sup>6</sup>. If in the case of a person convicted by the ICC the request is not accompanied by a warrant of arrest, but is accompanied by: (1) a copy of the judgment of conviction; (2) information to demonstrate that the person sought is the one referred to in the judgment of conviction; and (3) where the person sought has been sentenced, a copy of the sentence imposed and a statement of any time already served and the time remaining to be served, the officer must issue a warrant for the arrest of the person to whom the request relates<sup>7</sup>. A person arrested under such a warrant must be brought before a competent court<sup>8</sup> as soon as is practicable<sup>9</sup>.

Where the Secretary of State receives from the ICC a request for the provisional arrest of a person alleged to have committed an ICC crime or to have been convicted by the ICC and it appears to the Secretary of State that application for a provisional warrant should be made, he must transmit the request to a constable and direct the constable to apply for a provisional warrant for the arrest of that person; and, on an application by a constable stating on oath that he has reason to believe that a request has been made on grounds of urgency by the ICC for the arrest of a person and that the person is in, or on his way to, the United Kingdom, an appropriate judicial officer must issue a provisional warrant for the arrest of that person<sup>10</sup>. On issuing a provisional warrant the appropriate judicial officer must notify the Secretary of State that he has done so<sup>11</sup>.

A person arrested under a provisional warrant must be brought before a competent court as soon as is practicable<sup>12</sup>. If a warrant<sup>13</sup> is produced to the court in respect of that person, the court must proceed as if he had been arrested under that warrant<sup>14</sup>. If no such warrant is produced, the court must remand him pending the production of such a warrant<sup>15</sup>. If at any time when the person is so remanded there is produced to the court a warrant in respect of him, the court must terminate the period of remand<sup>16</sup>; and he is to be treated as if arrested under that warrant, if he was remanded in custody, at the time the warrant was produced to the court, or, if he was remanded on bail, when he surrenders to his bail<sup>17</sup>. If no such warrant is produced to the court before the end of the period of the remand, including any extension of that period, the court must discharge him<sup>18</sup>.

Where the ICC informs the Secretary of State that a person arrested<sup>19</sup> is no longer required to be surrendered, the Secretary of State must notify an appropriate judicial officer of that fact; and that officer must, on receipt of the notification, make an order for that person's discharge<sup>20</sup>.

1 As to the Secretary of State see PARA 29.

2 As to the International Criminal Court see PARA 437.

3 'ICC crime' means a crime (other than the crime of aggression) over which the ICC has jurisdiction in accordance with the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998), 999) (the 'ICC Statute'): International Criminal Court Act 2001 s 1(1). As to the ICC Statute see PARA 422 et seq.

4 International Criminal Court Act 2001 s 2(1). 'Appropriate judicial officer' means a district judge (magistrates' courts) designated for the purposes of the International Criminal Court Act 2001 by the Lord Chief Justice after consulting the Lord Chancellor: s 26(1) (amended by the Courts Act 2003 Sch 8 para 404, Sch 10; and the Constitutional Reform Act 2005 Sch 4 Pt 1 para 299). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the International Criminal Court Act 2001 s 26: s 26(2) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 299).

5 As to proof of orders, judgments, warrants or requests of the ICC see the International Criminal Court Act 2001 Sch 1 para 5.

6 International Criminal Court Act 2001 s 2(3). For the purposes of any enactment or rule of law relating to warrants of arrest, a 'section 2 warrant' indorsed or issued in any part of the United Kingdom, or a provisional warrant issued in any part of the United Kingdom, must be treated as if it were a warrant for the arrest of a person for an offence committed in that part of the United Kingdom: s 14(1). Any such warrant may be executed in any part of the United Kingdom, and may be so executed by any person to whom it is directed or by any constable: s 14(2). A person arrested under any such warrant is to be deemed to continue in legal custody until he is brought before a competent court: s 14(3). A 'section 2 warrant' is a warrant indorsed or issued under the International Criminal Court Act 2001 s 2 (see the text and notes 4-6): s 2(5). As to the meaning of 'United Kingdom' see PARA 30 note 3.

The copy of a warrant issued by the ICC that is transmitted to the Secretary of State is to be treated as if it were the original warrant (see s 25(1)), and faxed documents are to be treated as if they were the originals and may accordingly be received in evidence (see s 25(2)). Where the ICC amends a warrant of arrest, the provisions of Pt 2 (ss 2-26) apply to the amended warrant as if it were a new warrant although this does not affect the validity of anything done in reliance on the old warrant: s 25(3).

7 International Criminal Court Act 2001 s 2(4).

8 'Competent court' means a court consisting of an appropriate judicial officer: International Criminal Court Act 2001 s 26(1).

9 International Criminal Court Act 2001 s 5(1). As to proceedings for a delivery order under s 5 see PARA 439.

10 International Criminal Court Act 2001 s 3(1), (2). For the purposes of Pt 2, a warrant issued under s 3 is referred to as a 'provisional warrant': s 3(5).

11 International Criminal Court Act 2001 s 3(4).

12 International Criminal Court Act 2001 s 4(1).

13 I.e. a 'section 2 warrant'.

14 International Criminal Court Act 2001 s 4(2).

15 International Criminal Court Act 2001 s 4(3). A person may be remanded at any time pending the production of a 'section 2 warrant' in respect of him for a period of 18 days; and the total period for which a person may be so remanded is 60 days: see the International Criminal Court Act 2001 s 4(4); and the International Criminal Court (Remand Time) Order 2008, SI 2008/3135.

16 International Criminal Court Act 2001 s 4(5)(a).

17 International Criminal Court Act 2001 s 4(5)(b).

18 International Criminal Court Act 2001 s 4(6). The fact that a person has been discharged under s 4 does not prevent his subsequent arrest under a 'section 2 warrant': s 4(7).

19 I.e. under the International Criminal Court Act 2001 Pt 2.

20 International Criminal Court Act 2001 s 20(1).

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### **439. Delivery order.**

If, in relation to a person arrested under a warrant<sup>1</sup> and brought before a competent court<sup>2</sup>, the court is satisfied that the warrant is a warrant of the International Criminal Court (the 'ICC')<sup>3</sup> and has been duly indorsed<sup>4</sup>, or has been duly issued<sup>5</sup>, and that the person brought before the court is the person named or described in the warrant, the court must make a delivery order<sup>6</sup>. In the case of a person alleged to have committed an ICC crime<sup>7</sup>, the competent court may adjourn the proceedings pending the outcome of any challenge before the ICC to the admissibility of the case or to the jurisdiction of the ICC<sup>8</sup>.

In deciding whether to make a delivery order the court is not concerned to inquire whether any warrant issued by the ICC was duly issued, or, in the case of a person alleged to have committed an ICC crime, whether there is evidence to justify his trial for the offence he is alleged to have committed<sup>9</sup>. Whether or not it makes a delivery order, the competent court may of its own motion, and must on the application of the person arrested, determine whether that person was lawfully arrested in pursuance of the warrant, and whether his rights have been respected<sup>10</sup>. If the court determines that the person has not been lawfully arrested in pursuance of the warrant, or that the person's rights have not been respected, it must make a declaration to that effect, but may not grant any other relief<sup>11</sup>.

The court has the like powers, as nearly as may be, including power to adjourn the case and meanwhile to remand the person whose surrender is sought, as if the proceedings were the summary trial of an information against that person<sup>12</sup>. If the court adjourns the proceedings, it must on doing so remand the person whose surrender is sought<sup>13</sup>.

Where a competent court makes a delivery order in respect of a person, the court must: (1) commit the person to custody or on bail to await the Secretary of State's directions as to the execution of the order<sup>14</sup>; (2) inform the person of his rights to a review of the delivery order<sup>15</sup> in ordinary terms and in a language which appears to the court to be one which he fully understands and speaks<sup>16</sup>; and (3) notify the Secretary of State of its decision<sup>17</sup>.

A delivery order is sufficient authority for any person acting in accordance with the directions of the Secretary of State to receive the person to whom the order relates, keep him in custody and convey him to the place where he is to be delivered up into the custody of the ICC or, as the case may be, the state of enforcement, in accordance with arrangements made by the Secretary of State<sup>18</sup>. A person in respect of whom a delivery order is in force is deemed to be in legal custody at any time when, being in the United Kingdom or on board a British ship<sup>19</sup>, a British aircraft<sup>20</sup> or a British hovercraft<sup>21</sup>, he is being taken under the order to or from any place or is being kept in custody pending his delivery up under the order<sup>22</sup>. If a person in respect of whom a delivery order is in force escapes or is unlawfully at large, he may be arrested without warrant by a constable and taken to any place where or to which he is required to be or to be taken<sup>23</sup>.

If the person in respect of whom a delivery order has been made is not delivered up under the order within 40 days after it was made, an application may be made, by him or on his behalf, for his discharge<sup>24</sup>. On such an application, the court must order the person's discharge unless reasonable cause is shown for the delay<sup>25</sup>.

1    le under a 'section 2 warrant': see PARA 438. As to the meaning of 'section 2 warrant' see PARA 438 note 6.

- 2 As to the meaning of 'competent court' see PARA 438 note 8.
- 3 As to the International Criminal Court see PARA 437.
- 4 le under the International Criminal Court Act 2001 s 2(3): see PARA 438.
- 5 le under the international Criminal Court Act 2001 s 2(4): see PARA 438.
- 6 See the International Criminal Court Act 2001 s 5(1), (2). A 'delivery order' is an order that the person be delivered up into the custody of the ICC or, if the ICC so directs in the case of a person convicted by the ICC, into the custody of the state of enforcement, in accordance with arrangements made by the Secretary of State: s 5(3). As to the Secretary of State see PARA 29.  
As to the procedure where the court refuses to make a delivery order see s 8; and PARA 442.
- 7 As to the meaning of 'ICC crime' see PARA 438 note 3.
- 8 International Criminal Court Act 2001 s 5(4).
- 9 International Criminal Court Act 2001 s 5(5).
- 10 International Criminal Court Act 2001 s 5(6). In making such a determination the court must apply the principles which would be applied on an application for judicial review: s 5(7). As to judicial review see **JUDICIAL REVIEW**.
- 11 International Criminal Court Act 2001 s 5(8). The court must notify the Secretary of State of any such declaration and the Secretary of State must transmit that notification to the ICC: s 5(9).
- 12 International Criminal Court Act 2001 s 6(1), (2)(a). The proceedings are criminal proceedings for the purposes of the Access to Justice Act 1999 Pt I (ss 1-26) (advice, assistance and representation: see **LEGAL AID**): International Criminal Court Act 2001 s 6(1), (2)(c). The Prosecution of Offences Act 1985 s 16(1)(c) (defence costs on dismissal of proceedings: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2059) applies, reading the reference to the dismissal of the information as a reference to the discharge of the person arrested: International Criminal Court Act 2001 s 6(1), (2)(d).
- 13 International Criminal Court Act 2001 s 6(1), (2)(b).
- 14 International Criminal Court Act 2001 s 11(1)(a). The person must be committed to prison or to the custody of a constable: s 11(2). A court which commits a person to custody under this provision may subsequently grant bail: s 11(3).
- 15 le under the International Criminal Court Act 2001 s 12: see PARA 443.
- 16 International Criminal Court Act 2001 s 11(1)(b).
- 17 International Criminal Court Act 2001 s 11(1)(c).
- 18 International Criminal Court Act 2001 s 15(1). A person authorised for the purposes of a delivery order to take the person to whom the order relates to or from any place, or to keep him in custody, has all the powers, authority, protection and privileges: (1) if he is in the United Kingdom, of a constable in that part of the United Kingdom; or (2) if he is outside the United Kingdom, of a constable in the part of the United Kingdom to or from which the other person is to be taken: s 15(3). As to the meaning of 'United Kingdom' see PARA 30 note 3.
- 19 'British ship' means a British ship within the meaning of the Merchant Shipping Act 1995 (see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 230) or one of Her Majesty's ships: International Criminal Court Act 2001 s 76(1). References in s 76(1) to Her Majesty's aircraft, hovercraft or ships are to the aircraft, hovercraft or, as the case may be, ships which belong to, or are exclusively employed in the service of, Her Majesty in right of the government of the United Kingdom: s 76(2).
- 20 'British aircraft' means a British-controlled aircraft within the meaning of the Civil Aviation Act 1982 s 92 (application of criminal law to aircraft: see **AIR LAW** vol 2 (2008) PARA 619), or one of Her Majesty's aircraft: International Criminal Court Act 2001 s 76(1). See note 19.
- 21 'British hovercraft' means a British-controlled hovercraft within the meaning of the Civil Aviation Act 1982 s 92 as applied in relation to hovercraft by virtue of provision made under the Hovercraft Act 1968, or one of Her Majesty's hovercraft: International Criminal Court Act 2001 s 76(1). See note 19.
- 22 International Criminal Court Act 2001 s 15(2).



23 International Criminal Court Act 2001 s 15(4). 'Constable', for these purposes, means a person who is a constable in any part of the United Kingdom, and, in relation to any place, a person who, at that place, has, under any enactment (including s 15(3): see note 18), the powers of a constable in any part of the United Kingdom: s 15(5).

24 International Criminal Court Act 2001 s 19(1). The application must be made to the High Court: s 19(2).

25 International Criminal Court Act 2001 s 19(3).

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#### **440. Consent to surrender.**

A person arrested following a request from the International Criminal Court (the 'ICC')<sup>1</sup> may consent to being delivered up into the custody of the ICC or, in the case of a person convicted by the ICC, of the state of enforcement<sup>2</sup>. Such a consent is referred to as a 'consent to surrender'<sup>3</sup>.

Consent to surrender may be given by the person himself or, in circumstances in which it is inappropriate for the person to act for himself by reason of his physical or mental condition or his youth, by an appropriate person acting on his behalf<sup>4</sup>. Consent to surrender must be given in writing in the prescribed form<sup>5</sup> or a form to the like effect<sup>6</sup>, and must be signed in the presence of a justice of the peace<sup>7</sup>.

Where consent to surrender has been given: (1) a competent court<sup>8</sup> before which the person is brought must forthwith make a delivery order<sup>9</sup>; and (2) the person is taken to have waived his rights to a review of the delivery order<sup>10</sup>. Notice that consent to surrender has been given must be given: (a) if the person is in custody, to the prison governor, constable or other person in whose custody he is<sup>11</sup>; or (b) if the person is on bail, to the officer in charge of the police station at which he is required to surrender to custody<sup>12</sup>.

1     I.e. a person arrested under the International Criminal Court Act 2001 Pt 2 (ss 2-26). As to the power of arrest see PARA 438. As to the International Criminal Court see PARA 437.

2     International Criminal Court Act 2001 s 7(1).

3     International Criminal Court Act 2001 s 7(1).

4     International Criminal Court Act 2001 s 7(2).

5     'Prescribed form' means that prescribed by Criminal Procedure Rules: International Criminal Court Act 2001 s 7(3) (amended by the Courts Act 2003 Sch 8 para 403). As to the Criminal Procedure Rules see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

6     International Criminal Court Act 2001 s 7(3)(a).

7     International Criminal Court Act 2001 s 7(3)(b).

8     As to the meaning of 'competent court' see PARA 438 note 8.

9     International Criminal Court Act 2001 s 7(4)(a). As to the meaning of 'delivery order' see PARA 439 note 6; and as to delivery orders generally see PARA 439.

10    International Criminal Court Act 2001 s 7(4)(b). As to the right to review of a delivery order see s 12; and PARA 443.

11    International Criminal Court Act 2001 s 7(5)(a).

12    International Criminal Court Act 2001 s 7(5)(b). For the purposes of s 7(5)(b), notice is to be treated as given if it is sent by registered post, or recorded delivery, addressed to the officer mentioned: s 7(6).

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#### **441. Delivery up of a person subject to other proceedings.**

Provision is made for cases where the Secretary of State<sup>1</sup> receives a request from the International Criminal Court (the 'ICC')<sup>2</sup> for the arrest and surrender, or provisional arrest, of a person: (1) against whom criminal proceedings are pending or in progress before a national court<sup>3</sup>, or who has been dealt with in such proceedings; (2) against whom extradition proceedings are pending or in progress in the United Kingdom, or in respect of whom a warrant or order has been made in such proceedings; or (3) against whom proceedings are pending or in progress in the United Kingdom for a delivery order<sup>4</sup>, or against whom a delivery order has been made in such proceedings<sup>5</sup>.

Where the Secretary of State receives a request from the ICC for the arrest and surrender, or provisional arrest, of a person, and criminal proceedings<sup>6</sup> against that person are pending or in progress before a court in England and Wales, the Secretary of State must inform the court of the request<sup>7</sup>. The court must, if necessary, adjourn the proceedings before it, for such period or periods as it thinks fit, so as to enable proceedings to be taken to determine whether a delivery order should be made<sup>8</sup>. If a delivery order is made and the criminal proceedings are still pending or in progress, the Secretary of State must consult the ICC before giving directions for the execution of the order, and may direct that the criminal proceedings are to be discontinued<sup>9</sup>. Where the Secretary of State directs that criminal proceedings are to be discontinued, the court before which the proceedings are pending or in progress must order their discontinuance, and make any other order necessary to enable the delivery order to be executed, including any necessary order as to the custody of the person concerned<sup>10</sup>. The discontinuance under these provisions of criminal proceedings in respect of an offence does not prevent the institution of fresh proceedings in respect of the offence<sup>11</sup>. Corresponding provision is made in relation to proceedings before a service court<sup>12</sup> and in relation to extradition proceedings<sup>13</sup>, and similar provision is also made to deal with the situation where other delivery proceedings are pending or in progress<sup>14</sup>.

Where a person who is a prisoner<sup>15</sup> is delivered up into the custody of the ICC, or into the custody of a state where he is to undergo imprisonment under a sentence of the ICC, he continues to be liable to complete any term of imprisonment or detention to which he had been sentenced by a national court<sup>16</sup>, but any time during which he is in the custody of the ICC or of another state is to be counted towards the completion of that term<sup>17</sup>. Where a court orders the discharge of a person who is a prisoner, the discharge is without prejudice to the liability of the prisoner to complete any term of imprisonment or detention to which he has been sentenced by a national court<sup>18</sup>; accordingly, a prisoner to whom such an order relates and whose sentence has not expired must be transferred in custody to the place where he is liable to be detained under the sentence to which he is subject<sup>19</sup>. Where a delivery order is made in respect of a person who is a prisoner, the order may include provision: (a) authorising the return of the prisoner into the custody of the Secretary of State in accordance with arrangements made by the Secretary of State with the ICC or, in the case of a prisoner taken to a place where he is to undergo imprisonment under a sentence of the ICC, in accordance with arrangements made by the Secretary of State with the state where that place is situated; and (b) for his transfer in custody to the place where he is liable to be detained under the sentence of the national court to which he is subject<sup>20</sup>.

1 As to the Secretary of State see PARA 29.

2 As to the International Criminal Court see PARA 437.

3 'National court' means a court in the United Kingdom or a service court; and 'service court' means the Court Martial, the Service Civilian Court, the Court Martial Appeal Court, or the Supreme Court on an appeal brought from the Court Martial Appeal Court: International Criminal Court Act 2001 s 75 (amended by the Armed Forces Act 2006 Sch 16 para 190). As to the meaning of 'United Kingdom' see PARA 30 note 3.

4 le under the United Nations (International Tribunal) (Former Yugoslavia) Order 1996, SI 1996/716, or the United Nations (International Tribunal) (Rwanda) Order 1996, SI 1996/1296. As to the meaning of 'delivery order' see PARA 439 note 6; and as to delivery orders generally see PARA 439.

5 International Criminal Court Act 2001 s 24.

6 For these purposes, 'criminal proceedings' means proceedings before a national court: (1) for dealing with an individual accused of an offence; (2) for dealing with an individual convicted of an offence; or (3) on an appeal from any such proceedings: International Criminal Court Act 2001 Sch 2 para 1.

7 International Criminal Court Act 2001 Sch 2 para 2(1).

8 International Criminal Court Act 2001 Sch 2 para 2(2). As to the procedure for delivery up of arrested persons see PARA 439.

9 International Criminal Court Act 2001 Sch 2 para 2(3). Where a court makes a delivery order in respect of a person in respect of whom an order (other than a sentence of imprisonment or detention) has been made in criminal proceedings before a national court, the court may make any order necessary to enable the delivery order to be executed, and may in particular suspend or revoke an order: Sch 2 para 6.

10 International Criminal Court Act 2001 Sch 2 para 2(4).

11 International Criminal Court Act 2001 Sch 2 para 2(5).

12 See the International Criminal Court Act 2001 Sch 2 para 4.

13 See the International Criminal Court Act 2001 Sch 2 para 8 (amended by the Extradition Act 2003 Sch 3 paras 1, 13); and the International Criminal Court Act 2001 Sch 2 para 10 (amended by the Extradition Act 2003 Sch 3 paras 1, 13, Sch 4). For these purposes, 'extradition proceedings' means proceedings before a court or judge in the United Kingdom under the Extradition Act 2003: International Criminal Court Act 2001 Sch 2 para 7 (amended by the Extradition Act 2003 Sch 3 paras 1, 13).

14 See the International Criminal Court Act 2001 Sch 2 paras 12, 14. 'Other delivery proceedings' means proceedings before a court in the United Kingdom for a delivery order under the United Nations (International Tribunal) (Former Yugoslavia) Order 1996, SI 1996/716, or the United Nations (International Tribunal) (Rwanda) Order 1996, SI 1996/1296: see the International Criminal Court Act 2001 Sch 2 para 11.

15 For these purposes, 'prisoner' means a person serving a sentence in a prison or other institution to which the Prison Act 1952 applies, or a person serving a sentence of service detention (within the meaning of the Armed Forces Act 2006: see **ARMED FORCES**) or imprisonment imposed by a service court: International Criminal Court Act 2001 Sch 2 para 5(5) (amended by the Armed Forces Act 2006 Sch 16 para 191).

16 International Criminal Court Act 2001 Sch 2 para 5(1).

17 International Criminal Court Act 2001 Sch 2 para 5(1).

18 International Criminal Court Act 2001 Sch 2 para 5(2).

19 International Criminal Court Act 2001 Sch 2 para 5(2).

20 International Criminal Court Act 2001 Sch 2 para 5(3).

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#### **442. Procedure where court refuses delivery order.**

If a competent court<sup>1</sup> refuses to make a delivery order<sup>2</sup>, it must make an order remanding the person arrested, and notify the Secretary of State<sup>3</sup> of its decision and of the grounds for it<sup>4</sup>. If the court is informed without delay that an appeal is to be brought<sup>5</sup>, the order remanding the person arrested continues to have effect<sup>6</sup>. If the court is not so informed, it must discharge the person arrested<sup>7</sup>.

If a competent court refuses to make a delivery order, the Secretary of State may appeal against the decision to the High Court<sup>8</sup>. If the High Court allows the appeal it may make a delivery order, or remit the case to the competent court to make a delivery order in accordance with the decision of the High Court<sup>9</sup>. If the High Court dismisses the appeal, the Secretary of State may, with the permission of the High Court or the Supreme Court, appeal to the Supreme Court<sup>10</sup>. The Supreme Court may exercise any of the powers conferred<sup>11</sup> on the High Court<sup>12</sup>.

1 As to the meaning of 'competent court' see PARA 438 note 8.

2 As to the meaning of 'delivery order' see PARA 439 note 6; and as to delivery orders generally see PARA 439.

3 As to the Secretary of State see PARA 29.

4 International Criminal Court Act 2001 s 8(1).

5 Ie under the International Criminal Court Act 2001 s 9 (see the text and notes 8-12) or s 10 (appeals in Scotland).

6 International Criminal Court Act 2001 s 8(2). The order ceases to have effect if the High Court dismisses the appeal and the Secretary of State does not without delay apply for permission to appeal to the Supreme Court or inform the High Court that he intends to apply for such permission: s 9(6) (amended by the Constitutional Reform Act 2005 Sch 9 para 75). Subject to that, any such order has effect so long as the case is pending: International Criminal Court Act 2001 s 9(6). For this purpose, a case is pending (unless proceedings are discontinued) until, disregarding any power of a court to allow a step to be taken out of time, there is no step that the Secretary of State can take: s 9(6).

7 International Criminal Court Act 2001 s 8(3).

8 International Criminal Court Act 2001 s 9(1). No permission is required for such an appeal, which must be by way of re-hearing: s 9(1).

9 International Criminal Court Act 2001 s 9(2). Where a delivery order is made by the High Court or by the Supreme Court (see the text and notes 11-12), the provisions of s 11(1)(a), (c), (2), (3) (procedure where court makes a delivery order: see PARA 439) apply in relation to that court as they apply to a competent court which makes a delivery order: s 9(5) (amended by the Constitutional Reform Act 2005 Sch 9 para 75).

10 International Criminal Court Act 2001 s 9(3) (amended by the Constitutional Reform Act 2005 Sch 9 para 75). In relation to a decision of the High Court on an appeal under these provisions, the Administration of Justice Act 1960 s 1 (appeals to the Supreme Court: see **COURTS** vol 10 (Reissue) PARA 362) applies with the omission of so much of s 1(2) as restricts the grant of leave to appeal: International Criminal Court Act 2001 s 9(3) (as so amended).

11 Ie by the International Criminal Court Act 2001 s 9(2): see the text and note 8.

12 International Criminal Court Act 2001 s 9(4) (amended by the Constitutional Reform Act 2005 Sch 9 para 75). See note 9.



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#### **443. Right to review of delivery order.**

The Secretary of State<sup>1</sup> must not give directions for the execution of a delivery order<sup>2</sup> until after the end of the period of 15 days beginning with the date on which the order is made<sup>3</sup>. If before the end of that period an application for habeas corpus<sup>4</sup> is made by the person in respect of whom the delivery order is made, or on his behalf, directions for the execution of the order must not be given while proceedings on the application are still pending<sup>5</sup>. On such an application for habeas corpus, the court must set aside the delivery order and order the person's discharge if it is not satisfied of certain matters<sup>6</sup>.

A person in respect of whom a delivery order has been made may waive his right to review of the order<sup>7</sup>. Waiver of the right to review may be made by the person himself or, in circumstances in which it is inappropriate for the person to act for himself by reason of his physical or mental condition or his youth, by an appropriate person acting on his behalf<sup>8</sup>. Waiver of the right to review must be made in writing in the prescribed form<sup>9</sup> or a form to the like effect<sup>10</sup>, and must be signed in the presence of a justice of the peace<sup>11</sup>.

Where a person has waived his right to review of the delivery order no application for habeas corpus as mentioned above may be made, and the order must be taken for all purposes to be validly made<sup>12</sup>. Notice that a person has waived his right to review must be given: (1) if the person is in custody, to the prison governor, constable or other person in whose custody he is<sup>13</sup>; or (2) if the person is on bail, to the officer in charge of the police station at which he is required to surrender to custody<sup>14</sup>.

1 As to the Secretary of State see PARA 29.

2 As to the meaning of 'delivery order' see PARA 439 note 6; and as to delivery orders generally see PARA 439.

3 International Criminal Court Act 2001 s 12(1). This does not apply if the person in respect of whom the order is made waives his rights under s 12 (see s 13; and the text and notes 7-14), or is taken to have done so (see s 7(4)(b); and PARA 440): s 12(1).

4 As to habeas corpus see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 207 et seq.

5 International Criminal Court Act 2001 s 12(2). Proceedings on any such application must be treated as pending until they are discontinued or there is no further possibility of an appeal; and, for this purpose, any power of a court to allow an appeal out of time is to be disregarded: s 12(3).

6 International Criminal Court Act 2001 s 12(4)(a). The matters referred to in the text are those mentioned in s 5(2) (see PARA 439): s 12(4)(a). The provisions of s 5(4)-(9) apply (with the necessary modifications) in relation to the court to which the application is made as they apply to the court that made the delivery order: see s 12(4)(b).

7 International Criminal Court Act 2001 s 13(1).

8 International Criminal Court Act 2001 s 13(2).

9 'Prescribed form' means that prescribed by Criminal Procedure Rules: International Criminal Court Act 2001 s 13(3) (amended by the Courts Act 2003 Sch 8 para 403). As to the Criminal Procedure Rules see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

10 International Criminal Court Act 2001 s 13(3)(a).

11 International Criminal Court Act 2001 s 13(3)(b).

- 12 International Criminal Court Act 2001 s 13(4).
- 13 International Criminal Court Act 2001 s 13(5)(a).
- 14 International Criminal Court Act 2001 s 13(5)(b). For the purposes of s 13(5)(b), notice is to be treated as given if it is sent by registered post, or recorded delivery, addressed to the officer mentioned: s 13(6).



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#### **444. Bail and custody.**

Where a court has power to remand a person<sup>1</sup>, it may: (1) remand him in custody, that is, commit him for the period of the remand to prison or to the custody of a constable<sup>2</sup>; or (2) if an application for bail is made to the court, remand him on bail, that is, direct him to surrender himself into the custody of the officer in charge of a specified police station at the time appointed for him to do so<sup>3</sup>. A court is not authorised<sup>4</sup> to grant bail to a person who is serving a sentence of imprisonment or detention to which he has been sentenced by a national court, or who is in custody awaiting trial or sentence by a national court<sup>5</sup>.

Where a person is granted bail by a competent court<sup>6</sup> but the court is unable to release the person because no surety or suitable surety is available, and the court fixes the amount in which the surety is to be bound with a view to the recognisance of the surety being entered into subsequently, the court must in the meantime commit the person to the custody of a constable<sup>7</sup>. During the period between the surrender to custody of a person granted bail and the end of the period of remand he must be treated as committed to the custody of the constable to whom he surrenders<sup>8</sup>; and where it appears to that officer that the end of the period of remand will be unexpectedly delayed, he must grant the person bail subject to a duty to surrender himself into the custody of the officer in charge of the specified police station<sup>9</sup> at the time appointed for him to do so<sup>10</sup>.

Where an application for bail is made<sup>11</sup>: (a) the court must notify the Secretary of State<sup>12</sup> of the application<sup>13</sup>; (b) the Secretary of State must consult with the International Criminal Court (the 'ICC')<sup>14</sup>; and (c) bail must not be granted without full consideration of any recommendations made by the ICC<sup>15</sup>. In considering any such application the court must consider: (i) whether, given the gravity of the offence or offences the person concerned is alleged to have committed or, as the case may be, of which he has been convicted by the ICC, there are urgent and exceptional circumstances justifying release on bail<sup>16</sup>; and (ii) whether any necessary measures have been or will be taken to secure that the person will surrender to custody in accordance with the terms of his bail<sup>17</sup>.

1    Ie under the International Criminal Court Act 2001 Pt 2 (ss 2-26).

2    International Criminal Court Act 2001 s 16(1)(a).

3    International Criminal Court Act 2001 s 16(1)(b). The time appointed for a person to surrender to custody must be a time appointed by the officer in charge of the specified police station and notified in writing to the person remanded, and must not be more than 24 hours before the time at which it appears to that officer that the period of remand is likely to end: s 16(3). The provisions of the Bail Act 1976 apply to proceedings under the International Criminal Court Act 2001 Pt 2 as to proceedings against a fugitive offender: s 16(2).

4    Ie by anything in the International Criminal Court Act 2001 Pt 2.

5    International Criminal Court Act 2001 s 16(5).

6    As to the meaning of 'competent court' see PARA 438 note 8.

7    International Criminal Court Act 2001 s 17(1), (2).

8    International Criminal Court Act 2001 s 17(1), (3).

9    Ie the police station specified by the competent court under the International Criminal Court Act 2001 s 16(1)(b) (see the text and note 3): see s 17(6).

10 International Criminal Court Act 2001 s 17(1), (4). The time is to be appointed by the officer in charge of the specified police station and notified in writing to the person remanded, and must not be more than 24 hours before the time at which it appears to that officer that the period of remand is likely to end: s 17(4).

If a person required to surrender to custody in accordance with s 17(4) fails to do so: (1) the court by which he was remanded may issue a warrant for his arrest (s 17(5)(a)); (2) the provisions of s 14 (effect of warrant of arrest: see PARA 438) apply in relation to the warrant (s 17(5)(b)); and (3) on his arrest the person must be brought before the court which must reconsider the question of bail (s 17(5)(c)).

11 le in proceedings under the International Criminal Court Act 2001 Pt 2 (ss 2-26).

12 As to the Secretary of State see PARA 29.

13 International Criminal Court Act 2001 s 18(1)(a).

14 International Criminal Court Act 2001 s 18(1)(b). As to the International Criminal Court see PARA 437.

15 International Criminal Court Act 2001 s 18(1)(c).

16 International Criminal Court Act 2001 s 18(3)(a).

17 International Criminal Court Act 2001 s 18(3)(b).

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#### **445. Request for transit and unscheduled landing.**

Where the Secretary of State<sup>1</sup> receives a request from the International Criminal Court (the 'ICC')<sup>2</sup> for transit of a person being surrendered by another state and the Secretary of State accedes to the request: (1) the request is to be treated as if it were a request for that person's arrest and surrender<sup>3</sup>; (2) the warrant accompanying the request is to be deemed to have been indorsed<sup>4</sup>; and (3) the person to whom the request relates is to be treated on arrival in the United Kingdom<sup>5</sup> as if he had been arrested under that warrant<sup>6</sup>. A person in transit under these provisions must not be granted bail<sup>7</sup>.

If a person being surrendered by another state makes an unscheduled landing in the United Kingdom, he may be arrested by any constable and must be brought before a competent court<sup>8</sup> as soon as is practicable<sup>9</sup>. The court must remand him in custody pending: (a) receipt by the Secretary of State of a request from the ICC for his transit<sup>10</sup>; and (b) the Secretary of State's decision whether to accede to the request<sup>11</sup>. If no such request is received by the Secretary of State before the end of the period of 96 hours beginning with the time of the arrested person's unscheduled landing, the Secretary of State must forthwith notify the court of that fact<sup>12</sup>; and the court must, on receipt of the notification, discharge the arrested person<sup>13</sup>. If the Secretary of State receives such a request before the end of that period, he must notify the court without delay of his decision whether to accede to the request<sup>14</sup>. If the Secretary of State notifies the court that he has decided to accede to the request, the court must, on receipt of the notification, terminate the period of remand<sup>15</sup>. If the Secretary of State notifies the court that he has decided not to accede to the request, the court must, on receipt of the notification, discharge the arrested person<sup>16</sup>.

1 As to the Secretary of State see PARA 29.

2 As to the International Criminal Court see PARA 437.

3 International Criminal Court Act 2001 s 21(1), (2)(a). As to requests for arrest and surrender see PARA 438.

In relation to a case where s 21 applies: (1) the reference in s 5(2)(a)(i) (see PARA 439) to the warrant having been duly indorsed under s 2(3) (see PARA 438) is to be read as a reference to the Secretary of State having acceded to the request for transit; and (2) the provisions of s 12(1) (right to review of delivery order: period for making application: see PARA 443) have effect as if the reference to 15 days (the period during which directions to execute delivery order are not to be given) were a reference to two days: s 21(3).

4 International Criminal Court Act 2001 s 21(1), (2)(b). As to indorsement of warrants see s 2(3); and PARA 438.

5 As to the meaning of 'United Kingdom' see PARA 30 note 3.

6 International Criminal Court Act 2001 s 21(1), (2)(c).

7 International Criminal Court Act 2001 s 21(4). As to the grant of bail see PARA 444.

8 As to the meaning of 'competent court' see PARA 438 note 8.

9 International Criminal Court Act 2001 s 22(1).

10 International Criminal Court Act 2001 s 22(2)(a).

11 International Criminal Court Act 2001 s 22(2)(b).

- 12 International Criminal Court Act 2001 s 22(3)(a).
- 13 International Criminal Court Act 2001 s 22(3)(b).
- 14 International Criminal Court Act 2001 s 22(4).
- 15 International Criminal Court Act 2001 s 22(5)(a). The provisions of s 21 (see the text and notes 1-7) apply, with the substitution for the reference in s 21(2)(c) (see head (3) in the text) to the time of arrival in the United Kingdom of a reference to the time of notification to the court: s 22(5)(b).
- 16 International Criminal Court Act 2001 s 22(6).

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#### **446. State or diplomatic immunity.**

Any state or diplomatic immunity<sup>1</sup> attaching to a person by reason of a connection with a state party to the ICC Statute<sup>2</sup> does not prevent proceedings under Part 2 of the International Criminal Court Act 2001<sup>3</sup> in relation to that person<sup>4</sup>. Where state or diplomatic immunity attaches to a person by reason of a connection with a state other than a state party to the ICC Statute, and waiver of that immunity is obtained by the International Criminal Court (the 'ICC')<sup>5</sup> in relation to a request for that person's surrender, the waiver is to be treated as extending to the proceedings under Part 2 of the International Criminal Court Act 2001 in connection with that request<sup>6</sup>.

A certificate by the Secretary of State<sup>7</sup> that a state is or is not a party to the ICC Statute, or that there has been a waiver as mentioned above, is conclusive evidence of that fact for the purposes of Part 2 of the International Criminal Court Act 2001<sup>8</sup>.

The Secretary of State may in any particular case, after consultation with the ICC and the state concerned, direct that proceedings (or further proceedings), which but for these provisions would be prevented by state or diplomatic immunity attaching to a person, are not to be taken against that person<sup>9</sup>.

Provision is made to enable immunity to be overridden in relation to a referral made by the United Nations Security Council<sup>10</sup> to the ICC<sup>11</sup>.

1 'State or diplomatic immunity' means any privilege or immunity attaching to a person, by reason of the status of that person or another as head of state, or as representative, official or agent of a state, under: (1) the Diplomatic Privileges Act 1964, the Consular Relations Act 1968, the International Organisations Act 1968 or the State Immunity Act 1978; (2) any other legislative provision made for the purpose of implementing an international obligation; or (3) any rule of law derived from customary international law: International Criminal Court Act 2001 s 23(6).

2 I.e. the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998), 999). As to the ICC Statute see PARA 422 et seq.

3 I.e. the International Criminal Court Act 2001 Pt 2 (ss 2-26).

4 International Criminal Court Act 2001 s 23(1).

5 As to the International Criminal Court see PARA 437.

6 International Criminal Court Act 2001 s 23(2).

7 As to the Secretary of State see PARA 29.

8 International Criminal Court Act 2001 s 23(3).

9 International Criminal Court Act 2001 s 23(4).

10 As to the Security Council see PARAS 522-525.

11 See the International Criminal Court Act 2001 s 23(5). See also the International Criminal Court (Darfur) Order 2009, SI 2009/699.

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### **(iii) Investigations**

#### **447. Questioning of persons, obtaining evidence and service of process.**

Powers are conferred<sup>1</sup> on the Secretary of State<sup>2</sup> which are exercisable for the purpose of providing assistance to the International Criminal Court (the 'ICC')<sup>3</sup> in relation to investigations or prosecutions where an investigation has been initiated by the ICC, and the investigation and any proceedings arising out of it have not been concluded<sup>4</sup>.

Where the Secretary of State receives a request from the ICC for assistance in questioning a person being investigated or prosecuted, the person concerned must not be questioned in pursuance of the request unless he has been informed of his rights<sup>5</sup>, and he consents to be interviewed<sup>6</sup>.

Where the Secretary of State receives a request from the ICC for assistance in the taking or production of evidence<sup>7</sup>, the Secretary of State may nominate a court<sup>8</sup> to receive the evidence to which the request relates<sup>9</sup>. If in order to comply with the request it is necessary for the evidence received by the court to be verified in any manner, the notice nominating the court must specify the nature of the verification required<sup>10</sup>. In proceedings before a nominated court a person must not be compelled to give evidence or produce anything that he could not be compelled to give or produce in criminal proceedings in the part of the United Kingdom<sup>11</sup> in which the nominated court has jurisdiction<sup>12</sup>. The court may direct that the public be excluded from the court, if it thinks it necessary in order to protect: (1) victims and witnesses, or a person alleged to have committed an ICC crime<sup>13</sup>; or (2) confidential or sensitive information<sup>14</sup>. The court must ensure that a register is kept of the proceedings that indicates in particular: (a) which persons with an interest in the proceedings were present; (b) which of those persons were represented and by whom; and (c) whether any of those persons was denied the opportunity of cross-examining a witness as to any part of his testimony<sup>15</sup>. A copy of the register of the proceedings must be sent to the Secretary of State for transmission to the ICC<sup>16</sup>. No order for costs may be made<sup>17</sup>.

Where the Secretary of State receives a summons or other document from the ICC together with a request for it to be served on a person<sup>18</sup>, he may direct the chief officer of police for the area in which the person appears to be to cause the document to be personally served on him<sup>19</sup>. If the document is so served, the chief officer of police must forthwith inform the Secretary of State when and how it was served<sup>20</sup>, and if it does not prove possible to serve the document, the chief officer of police must forthwith inform the Secretary of State of that fact and of the reason for it<sup>21</sup>.

1    le by the International Criminal Court Act 2001 Pt 3 (ss 27-41). Nothing in Pt 3 is to be read as preventing the provision of assistance to the ICC otherwise than under Pt 3: s 27(3).

2    As to the Secretary of State see PARA 29.

3    As to the International Criminal Court see PARA 437.

4    International Criminal Court Act 2001 s 27(1). Where facsimile transmission is used for the making of a request by the ICC for assistance or the transmission of any supporting documents, or for the transmission of any document in consequence of such a request, Pt 3 applies as if the documents so sent were the originals of the documents so transmitted; and any such document may accordingly be received in evidence: see s 27(2).

Any evidence or other material obtained under Pt 3 by a person other than the Secretary of State, together with any requisite verification, must be sent to the Secretary of State for transmission to the ICC: s 41(1). Where any evidence or other material is to be transmitted to the ICC:

- 8 (1) if the material consists of a document, the original or a copy must be transmitted; and
- 9 (2) if the material consists of any other article, the article itself or a photograph or other description of it must be transmitted,

as may be necessary to comply with the request of the ICC: s 41(2).

5 The text refers to rights under the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998), 999) (the 'ICC Statute') art 55. As to the provisions of art 55 see the International Criminal Court Act 2001 s 28(3), Sch 3. As to the ICC Statute see PARA 422 et seq.

6 International Criminal Court Act 2001 s 28(1), (2). For these purposes, consent may be given by the person himself or, in circumstances in which it is inappropriate for the person to act for himself by reason of his physical or mental condition or his youth, by an appropriate person acting on his behalf: s 28(4). Such consent may be given orally or in writing, but if given orally it must be recorded in writing as soon as is reasonably practicable: s 28(5).

7 For these purposes, 'evidence' includes documents and other articles: International Criminal Court Act 2001 s 29(1).

8 The nominated court has the same powers with respect to securing the attendance of witnesses and the production of documents or other articles as it has for the purpose of other proceedings before the court, and may take evidence on oath: International Criminal Court Act 2001 s 29(3).

9 International Criminal Court Act 2001 s 29(1), (2).

10 International Criminal Court Act 2001 s 29(5).

11 As to the meaning of 'United Kingdom' see PARA 30 note 3.

12 International Criminal Court Act 2001 s 29(4).

13 As to the meaning of 'ICC crime' see PARA 438 note 3.

14 See the International Criminal Court Act 2001 s 30(1), (2).

15 International Criminal Court Act 2001 s 30(1), (3). The register must not be open to inspection except as authorised by the Secretary of State or with the leave of the court: s 30(4).

16 International Criminal Court Act 2001 s 30(5).

17 International Criminal Court Act 2001 s 29(6).

18 International Criminal Court Act 2001 s 31(1).

19 International Criminal Court Act 2001 s 31(2).

20 International Criminal Court Act 2001 s 31(3).

21 International Criminal Court Act 2001 s 31(4).

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#### **448. Transfer of prisoners.**

Where the Secretary of State<sup>1</sup> receives a request from the International Criminal Court (the 'ICC')<sup>2</sup> for the temporary transfer of a prisoner<sup>3</sup> to the ICC for purposes of identification or for obtaining testimony or other assistance, he may issue a warrant (a 'transfer warrant') requiring the prisoner to be delivered up, in accordance with arrangements made by the Secretary of State with the ICC, into the custody of the ICC<sup>4</sup>. A transfer warrant must not be issued unless the prisoner consents to the transfer, but consent may not be withdrawn after the issue of the warrant<sup>5</sup>.

1 As to the Secretary of State see PARA 29.

2 As to the International Criminal Court see PARA 437.

3 'Prisoner' means: (1) a person serving a sentence in a prison to which the Prison Act 1952 applies; (2) a person serving a sentence of service detention (within the meaning of the Armed Forces Act 2006: see **ARMED FORCES**) or imprisonment imposed by a service court (as to the meaning of which see PARA 441 note 3); (3) a person detained in custody otherwise than in pursuance of a sentence, including in particular a person in custody awaiting trial or sentence, a person committed to prison for contempt or for default in paying a fine, a person in custody in connection with proceedings to which the International Criminal Court Act 2001 Sch 2 Pt 2 or Sch 2 Pt 3 (see PARA 441) applies; (4) a person detained under any provision of the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002: International Criminal Court Act 2001 s 32(6) (amended by the Armed Forces Act 2006 Sch 16 para 188; and by SI 2003/1016).

4 International Criminal Court Act 2001 s 32(1), (3). Section 15 (see PARA 439), s 24 and Sch 2 (see PARA 441) apply in relation to a transfer warrant under s 32 as they apply in relation to a delivery order: s 32(5). As to the meaning of 'delivery order' see PARA 439 note 6; and as to delivery orders generally see PARA 439.

For the purposes of the Immigration Acts (within the meaning given by the Nationality, Immigration and Asylum Act 2002 s 158: see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**), a person detained under any provision of the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002 is not to be regarded as having left the United Kingdom at any time when a transfer warrant is in force in respect of him (including any time when he is in the custody of the ICC): International Criminal Court Act 2001 s 32(7) (amended by SI 2003/1016). As to the meaning of 'United Kingdom' see PARA 30 note 3.

5 International Criminal Court Act 2001 s 32(4).



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#### **449. Powers of entry, search and seizure and other powers.**

Where the Secretary of State<sup>1</sup> receives from the International Criminal Court (the 'ICC')<sup>2</sup> a request for assistance which appears to him to require the exercise of any of the powers of entry, search and seizure conferred by Part 2 of the Police and Criminal Evidence Act 1984<sup>3</sup>, he may direct a constable to apply for a warrant or order, which is to apply in relation to an ICC crime<sup>4</sup> as it applies to an indictable offence<sup>5</sup>.

Provision is made with respect to the taking of fingerprints or a non-intimate sample<sup>6</sup> in response to a request from the ICC for assistance in obtaining evidence as to the identity of a person<sup>7</sup>. Where the Secretary of State receives such a request from the ICC, he may nominate a court to supervise the taking of the person's fingerprints or a non-intimate sample, or both<sup>8</sup>. He may only do so, however, if he is satisfied that other means of identification have been tried and have proved inconclusive, and he has notified the ICC of that fact and the ICC has signified that it wishes to proceed with the request<sup>9</sup>.

A coroner has power to order an exhumation in connection with proceedings before the ICC in respect of an ICC crime<sup>10</sup>.

Where the Secretary of State receives a request from the ICC for assistance in ascertaining whether a person has benefited from an ICC crime, or in identifying the extent or whereabouts of property derived directly or indirectly from an ICC crime, the Secretary of State may direct a constable<sup>11</sup> to apply for a production or access order or for a search warrant<sup>12</sup>. Where the Secretary of State receives a request from the ICC for assistance in the freezing or seizure of proceeds, property and assets or instrumentalities of crime for the purpose of eventual forfeiture, he may authorise a person to act on behalf of the ICC for the purposes of applying for a freezing order, and direct that person to apply for such an order<sup>13</sup>.

Where the Secretary of State receives a request from the ICC for the provision of records and documents relating to the evidence given in any proceedings in respect of conduct that would constitute an ICC crime, or the results of any investigation of such conduct with a view to such proceedings, he must take such steps as appear to him to be appropriate to obtain the records and documents requested, and on their being produced to him he must transmit them to the ICC<sup>14</sup>.

Nothing in these provisions requires or authorises the production of documents, or the disclosure of information, which is prejudicial to the security of the United Kingdom<sup>15</sup>.

If in order to comply with a request of the ICC it is necessary for any evidence or other material to be verified in any manner, the Secretary of State may give directions as to the nature of the verification required<sup>16</sup>.

1 As to the Secretary of State see PARA 29.

2 As to the International Criminal Court see PARA 437.

3 I.e the Police and Criminal Evidence Act 1984 Pt 2 (ss 8-23): see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 869 et seq.

4 As to the meaning of 'ICC crime' see PARA 438 note 3.

5 International Criminal Court Act 2001 s 33(1), (2) (s 33(2) amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 49). As to the meaning of 'indictable offence' see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1102.

6 For these purposes, 'fingerprints' and 'non-intimate sample' have the meanings given by the Police and Criminal Evidence Act 1984 s 65 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARAS 1021, 1027): International Criminal Court Act 2001 s 34(2).

7 See the International Criminal Court Act 2001 s 34(1), Sch 4.

8 International Criminal Court Act 2001 Sch 4 para 1(1). Fingerprints and samples so taken must be destroyed in the same way as if they had been taken under the Police and Criminal Evidence Act 1984: see the International Criminal Court Act 2001 Sch 4 para 8.

9 International Criminal Court Act 2001 s 34(1), Sch 4 para 1(2).

10 See the International Criminal Court Act 2001 s 35 (prospectively amended by the Coroners and Justice Act 2009 Sch 21 para 45).

11 For these purposes, 'constable' includes a person commissioned by the Commissioners for Her Majesty's Revenue and Customs: International Criminal Court Act 2001 Sch 5 para 11 (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1)).

12 International Criminal Court Act 2001 s 37(1). As to production or access orders see Sch 5 Pt 1; as to the issuing of search warrants see Sch 5 Pt 2; and as to supplementary provisions see Sch 5 Pt 3.

13 International Criminal Court Act 2001 s 38. As to freezing orders see Sch 6.

14 International Criminal Court Act 2001 s 36(1), (2).

15 International Criminal Court Act 2001 s 39(1). As to the meaning of 'United Kingdom' see PARA 30 note 3. For these purposes, a certificate signed by or on behalf of the Secretary of State to the effect that it would be prejudicial to the security of the United Kingdom for specified documents to be produced, or for specified information to be disclosed, is conclusive evidence of that fact: s 39(2).

16 International Criminal Court Act 2001 s 40.

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#### **(iv) Enforcement of Sentences and Orders**

##### **450. Detention in pursuance of an International Criminal Court sentence.**

Where the United Kingdom<sup>1</sup> is designated by the International Criminal Court (the 'ICC')<sup>2</sup> as the state in which a person (the 'prisoner') is to serve a sentence of imprisonment imposed by the ICC, and the Secretary of State<sup>3</sup> informs the ICC that the designation is accepted, he must issue a warrant authorising the bringing of the prisoner to the jurisdiction, the detention of the prisoner there in accordance with the sentence of the ICC, and the taking of the prisoner to a specified place where he is to be detained<sup>4</sup>. A prisoner subject to such a warrant authorising his detention is to be treated<sup>5</sup> as if he were subject to a sentence of imprisonment imposed in exercise of its criminal jurisdiction by a court in the part of the United Kingdom in which he is to be detained<sup>6</sup>.

Where a person who completes a term of imprisonment imposed by the ICC is still subject to a domestic sentence<sup>7</sup> of imprisonment, whether imposed before or during his imprisonment in pursuance of the sentence of the ICC, and has been transferred<sup>8</sup> to another part of the United Kingdom, he is to be treated as if he had been transferred<sup>9</sup> from the part of the United Kingdom in which the domestic sentence was imposed, on a restricted transfer subject to such conditions as Secretary of State may consider appropriate<sup>10</sup>.

1 As to the meaning of 'United Kingdom' see PARA 30 note 3.

2 As to the International Criminal Court see PARA 437.

3 As to the Secretary of State see PARA 29.

4 International Criminal Court Act 2001 s 42(1), (3). Any reference to a person being detained in a part of the United Kingdom is to his being subject to a warrant authorising his detention there: s 48(1). The provisions of the warrant may be varied by the Secretary of State, and must be so varied to give effect to any variation of the ICC's sentence: s 42(3). As to enforcement of sentences imposed by the International Criminal Court see the Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the International Criminal Court on the enforcement of sentences imposed by the International Criminal Court (London, 8 November 2007; TS 1 (2008); Cm 7306).

5 Ie for all purposes, subject to the International Criminal Court Act 2001 s 42(5) and Sch 7. Section 42(5) provides that the Repatriation of Prisoners Act 1984 (see **PRISONS** vol 36(2) (Reissue) PARA 555 et seq) and the Crime (Sentences) Act 1997 Sch 1 (transfers of prisoners within the British Islands: see **PRISONS** vol 36(2) (Reissue) PARA 548 et seq) do not apply to a person detained in pursuance of a sentence of the ICC; as to transfer of such a person within the United Kingdom see the International Criminal Court Act 2001 ss 44, 45; and PARA 451. The operation of certain other statutory provisions is excluded in relation to a person detained in pursuance of a sentence of the ICC: see s 42(6), Sch 7 (Sch 7 amended by the Criminal Justice Act 2003 Sch 32 para 139; the Criminal Justice and Immigration Act 2008 s 22(7); SI 2001/2565; SI 2008/1241).

6 International Criminal Court Act 2001 s 42(4).

7 'Domestic sentence' means a sentence imposed by a court in the United Kingdom: International Criminal Court Act 2001 s 46(2).

8 Ie under the International Criminal Court Act 2001 ss 44, 45: see note 5.

9 Ie by order under the Crime (Sentences) Act 1997 Sch 1: see **PRISONS** vol 36(2) (Reissue) PARA 548 et seq.

10 International Criminal Court Act 2001 s 46(1).

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**451. Temporary return or transfer of custody to another state, or another part of the United Kingdom.**

Where the Secretary of State<sup>1</sup> receives a request from the International Criminal Court (the 'ICC')<sup>2</sup> for the temporary return of a prisoner to the custody of the ICC for the purposes of any proceedings, or for the transfer of the prisoner to the custody of another state in pursuance of a change in designation of state of enforcement, he must: (1) issue a warrant authorising the prisoner's temporary return or transfer in accordance with the request; (2) make the necessary arrangements with the ICC or, as the case may be, the other state; and (3) give such directions as to the custody, surrender and, where appropriate, return of the prisoner as appear to him appropriate to give effect to the arrangements<sup>3</sup>. Where the prisoner is temporarily returned to the custody of the ICC, the warrant authorising his detention in any part of the United Kingdom<sup>4</sup> continues to have effect so as to apply to him again on his return<sup>5</sup>.

The Secretary of State may make an order, subject to such conditions (if any) as he may impose from time to time, for the transfer of the prisoner to another part of the United Kingdom to serve the whole or part of the remainder of the ICC sentence there<sup>6</sup>. If such an order is made the warrant authorising the prisoner's detention in the part of the United Kingdom from which he is transferred continues to have effect, and has effect as if it were a warrant authorising his detention in the part of the United Kingdom to which he is transferred<sup>7</sup>.

Where it appears to the Secretary of State that the prisoner should be transferred to another part of the United Kingdom for the purpose of attending criminal proceedings against him there, or that the attendance of the prisoner at a place in another part of the United Kingdom is desirable in the interests of justice, or for the purposes of any public inquiry<sup>8</sup>, he may, subject to such conditions (if any) as he thinks fit to impose<sup>9</sup>, make an order for the transfer of the prisoner to that part of the United Kingdom<sup>10</sup>. Where such an order is made the warrant authorising the prisoner's detention in the part of the United Kingdom from which he is transferred continues to have effect, and he must be returned to that part of the United Kingdom when the purposes for which the order is made are fulfilled<sup>11</sup>.

1 As to the Secretary of State see PARA 29.

2 As to the International Criminal Court see PARA 437.

3 International Criminal Court Act 2001 s 43(1), (3).

4 As to the meaning of 'United Kingdom' see PARA 30 note 3.

5 International Criminal Court Act 2001 s 43(4).

6 International Criminal Court Act 2001 s 44(1), (3). No such order may be made for the transfer of the prisoner to Scotland without the agreement of the Scottish Ministers, or for the transfer of the prisoner from Scotland without the agreement of the Secretary of State: s 44(2).

7 International Criminal Court Act 2001 s 44(4). A prisoner transferred under s 44 is treated for all purposes, subject as mentioned in s 42(4) (see PARA 450), as if he were serving a sentence of imprisonment imposed in exercise of its criminal jurisdiction by a court in the part of the United Kingdom to which he is transferred: s 44(5).

8 International Criminal Court Act 2001 s 45(1).

9 International Criminal Court Act 2001 s 45(4). Any such conditions may be varied or removed at any time: s 45(4).

10 International Criminal Court Act 2001 s 45(2). No such order may be made for the transfer of the prisoner to Scotland without the agreement of the Scottish Ministers, or for the transfer of the prisoner from Scotland without the agreement of the Secretary of State: s 45(3).

11 International Criminal Court Act 2001 s 45(5).

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#### **452. Custody of prisoner in transit.**

Where a prisoner is subject to a warrant<sup>1</sup>, but is not in legal custody under the Prison Act 1952, the prisoner is deemed to be in the legal custody of the Secretary of State<sup>2</sup> at any time when, being in the United Kingdom<sup>3</sup> or on board a British ship<sup>4</sup>, a British aircraft<sup>5</sup> or a British hovercraft<sup>6</sup>, he is being taken to or from any place or is being kept in custody<sup>7</sup>. The Secretary of State may, from time to time, designate a person as a person who is for the time being authorised to take the prisoner to or from any place or to keep the prisoner in custody<sup>8</sup>. A person so authorised has all the powers, authority, protection and privileges of a constable in the part of the United Kingdom in which that person is for the time being, or, if he is outside the United Kingdom, of a constable in the part of the United Kingdom to or from which the prisoner is to be taken<sup>9</sup>. If the prisoner escapes or is unlawfully at large, he may be arrested without warrant by a constable<sup>10</sup> and taken to any place to which he may be taken under the original warrant<sup>11</sup>.

1    le under any provision of the International Criminal Court Act 2001 Pt 4 (ss 42-49).

2    As to the Secretary of State see PARA 29.

3    As to the meaning of 'United Kingdom' see PARA 30 note 3.

4    As to the meaning of 'British ship' see PARA 439 note 19.

5    As to the meaning of 'British aircraft' see PARA 439 note 20.

6    As to the meaning of 'British hovercraft' see PARA 439 note 21.

7    International Criminal Court Act 2001 s 47(1), (2).

8    International Criminal Court Act 2001 s 47(3).

9    International Criminal Court Act 2001 s 47(4).

10   For the purposes of the International Criminal Court Act 2001 s 47(5), 'constable', in relation to any part of the United Kingdom, means: (1) a person who is a constable in that or any other part of the United Kingdom; or (2) a person who, at the place in question, has under any enactment (including s 47(4): see the text and note 9) the powers of a constable in that or any other part of the United Kingdom: s 47(5). The 'original warrant' is the warrant referred to in s 47(1) (see the text and notes 1-7).

11   International Criminal Court Act 2001 s 47(5).

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**453. Power to make provision for enforcement of orders relating to fines, forfeitures and reparations.**

The Secretary of State<sup>1</sup> may make provision by regulations for the enforcement of: (1) fines or forfeitures ordered by the International Criminal Court (the 'ICC')<sup>2</sup>; and (2) orders by the ICC against convicted persons specifying reparations to, or in respect of, victims<sup>3</sup>.

The regulations may authorise the Secretary of State: (a) to appoint a person to act on behalf of the ICC for the purposes of enforcing the order<sup>4</sup>; and (b) to give such directions to the appointed person as appear to him necessary<sup>5</sup>.

The regulations must provide for the registration of the order by a court as a precondition of enforcement<sup>6</sup>. An order must not be so registered unless the court is satisfied that the order is in force and not subject to appeal<sup>7</sup>. If the order has been partly complied with, the court must register the order for enforcement only so far as it has not been complied with<sup>8</sup>.

The regulations may provide that:

- 122 (i) for the purposes of enforcement, an order so registered has the same force and effect;
- 123 (ii) the same powers are exercisable in relation to its enforcement; and
- 124 (iii) proceedings for its enforcement may be taken in the same way,

as if the order were an order of an English court<sup>9</sup>.

A court must not exercise its powers of enforcement under the regulations in relation to any property unless it is satisfied: (A) that a reasonable opportunity has been given for persons holding any interest in the property to make representations to the court<sup>10</sup>; and (B) that the exercise of the powers will not prejudice the rights of bona fide third parties<sup>11</sup>.

The regulations may provide that the reasonable costs of and incidental to the registration and enforcement of an order are to be recoverable as if they were sums recoverable under the order<sup>12</sup>.

1 As to the Secretary of State see PARA 29.

2 As to the International Criminal Court see PARA 437.

3 International Criminal Court Act 2001 s 49(1). As to the regulations that have been made see the International Criminal Court Act 2001 (Enforcement of Fines, Forfeiture and Reparation Orders) Regulations 2001, SI 2001/2379 (amended by SI 2002/822). Rules provide that an application to the High Court to register an order of the ICC for enforcement, or to vary or set aside the registration of an order, may be made to a judge or a master of the Queen's Bench Division: CPR Sch 1 RSC Ord 115 r 38(1). CPR Sch 1 RSC Ord 115 rr 13, 15-20 apply, with such modifications as are necessary and subject to the provisions of any regulations made under the International Criminal Court Act 2001 s 49, to the registration for enforcement of an order of the ICC as they apply to the registration of an external confiscation order: CPR Sch 1 RSC Ord 115 r 38(2). 'Order of the ICC' means a fine or forfeiture ordered by the ICC, or an order by the ICC against a person convicted by the ICC specifying a reparation to, or in respect of, a victim: CPR Sch 1 RSC Ord 115 r 37.

4 International Criminal Court Act 2001 s 49(2)(a).

5 International Criminal Court Act 2001 s 49(2)(b).



6 International Criminal Court Act 2001 s 49(3).

7 International Criminal Court Act 2001 s 49(3).

8 International Criminal Court Act 2001 s 49(3).

9 See the International Criminal Court Act 2001 s 49(4). The regulations may for that purpose apply all or any of the provisions (including provisions of subordinate legislation) relating to enforcement of orders of a court of a country or territory outside the United Kingdom: s 49(4). As to the meaning of 'United Kingdom' see PARA 30 note 3.

10 International Criminal Court Act 2001 s 49(5)(a).

11 International Criminal Court Act 2001 s 49(5)(b).

12 International Criminal Court Act 2001 s 49(6).

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## **(v) Offences under Domestic Law**

### **454. Genocide, crimes against humanity and war crimes.**

It is an offence<sup>1</sup> against the law of England and Wales for a person to commit genocide<sup>2</sup>, a crime against humanity<sup>3</sup>, or a war crime<sup>4</sup>. This applies to acts<sup>5</sup> committed: (1) in England or Wales; or (2) outside the United Kingdom<sup>6</sup> by a United Kingdom national<sup>7</sup>, a United Kingdom resident<sup>8</sup> or a person subject to UK service jurisdiction<sup>9</sup>. Proceedings for a substantive offence<sup>10</sup> may be brought against a person in England or Wales who commits acts outside the United Kingdom at a time when he is not a United Kingdom national, a United Kingdom resident or a person subject to United Kingdom service jurisdiction and who subsequently becomes resident in the United Kingdom, if he is resident in the United Kingdom at the time the proceedings are brought, and the acts in respect of which the proceedings are brought would have constituted that offence if they had been committed in that part of the United Kingdom<sup>11</sup>. A person is regarded as committing an act or crime mentioned above only if the material elements are committed with intent and knowledge<sup>12</sup>.

In interpreting and applying the definitions of 'genocide', 'crime against humanity' and 'war crime' the court must take into account any relevant Elements of Crimes<sup>13</sup>, and any relevant judgment or decision of the International Criminal Court (the 'ICC')<sup>14</sup>. Account may also be taken of any other relevant international jurisprudence<sup>15</sup>. Furthermore the definitions of 'genocide', 'crime against humanity' and 'war crime' are to be construed subject to and in accordance with any relevant reservation or declaration made by the United Kingdom when ratifying any treaty or agreement relevant to the interpretation of those definitions<sup>16</sup>.

As from a day to be appointed the provisions noted above<sup>17</sup> apply to acts committed on or after 1 January 1991<sup>18</sup>.

1 In determining whether an offence under the International Criminal Court Act 2001 Pt 5 (ss 50-70) has been committed the court must apply the principles of the law of England and Wales: s 56(1). Nothing in Pt 5 may be read as restricting the operation of any enactment or rule of law relating to the extra-territorial application of offences (including offences under Pt 5), or offences ancillary to offences under Pt 5 (wherever committed): s 56(2). Provision is also made for the protection of victims and witnesses: see s 57.

2 'Genocide' means an act of genocide as defined in the Statute of the ICC art 6 (see PARA 429): International Criminal Court Act 2001 s 50(1).

3 'Crime against humanity' means a crime against humanity as defined in the Statute of the ICC art 7 (see PARA 430): International Criminal Court Act 2001 s 50(1).

4 International Criminal Court Act 2001 s 51(1). 'War crime' means a war crime as defined in the Statute of the ICC art 8.2 (see PARA 431): International Criminal Court Act 2001 s 50(1).

5 For the purposes of the International Criminal Court Act 2001 Pt 5 (ss 50-70), 'act' includes an omission, except where the context otherwise requires; and references to conduct have a corresponding meaning: s 69.

6 As to the meaning of 'United Kingdom' see PARA 30 note 3.

7 For the purposes of the International Criminal Court Act 2001 Pt 5, 'United Kingdom national' means an individual who is a British citizen; a British overseas territories citizen; a British national (overseas); a British overseas citizen; a person who under the British Nationality Act 1981 is a British subject; or a British protected person within the meaning of that Act: International Criminal Court Act 2001 s 67(1) (amended by the Overseas

Territories Act 2002 s 2(3)). See further **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 5 et seq.

8 'United Kingdom resident' means a person who is resident in the United Kingdom: International Criminal Court Act 2001 s 67(2). As from a day to be appointed the following individuals are, to the extent that it would not otherwise be the case, to be treated for the purposes of Pt 5 (ss 50-70) as being resident in the United Kingdom: (1) an individual who has indefinite leave to remain in the United Kingdom; (2) any other individual who has made an application for such leave (whether or not it has been determined) and who is in the United Kingdom; (3) an individual who has leave to enter or remain in the United Kingdom for the purposes of work or study and who is in the United Kingdom; (4) an individual who has made an asylum claim, or a human rights claim, which has been granted; (5) any other individual who has made an asylum claim or human rights claim (whether or not the claim has been determined) and who is in the United Kingdom; (6) an individual named in an application for indefinite leave to remain, an asylum claim or a human rights claim as a dependant of the individual making the application or claim if: (a) the application or claim has been granted; or (b) the named individual is in the United Kingdom (whether or not the application or claim has been determined); (7) an individual who would be liable to removal or deportation from the United Kingdom but cannot be removed or deported because of the Human Rights Act 1998 s 6 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**) or for practical reasons; (8) an individual (a) against whom a decision to make a deportation order under the Immigration Act 1971 s 5(1) by virtue of s 3(5)(a) (deportation conducive to the public good) (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 160) has been made; (b) who has appealed against the decision to make the order (whether or not the appeal has been determined); and (c) who is in the United Kingdom; (9) an individual who is an illegal entrant within the meaning of the Immigration Act 1971 s 33(1) (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 118) or who is liable to removal under the Immigration and Asylum Act 1999 s 10 (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 154); (10) an individual who is detained in lawful custody in the United Kingdom: International Criminal Court Act 2001 s 67A(1) (s 67A prospectively added by the Coroners and Justice Act 2009 s 70(1), (4). At the date at which this volume states the law no such day had been appointed under s 182(5)). When determining for the purposes of the International Criminal Court Act 2001 Pt 5 whether any other individual is resident in the United Kingdom regard is to be had to all relevant considerations including: (i) the periods during which the individual has been or intends to be in the United Kingdom; (ii) the purposes for which the individual is, has been or intends to be in the United Kingdom; (iii) whether the individual has family or other connections to the United Kingdom and the nature of those connections; and (iv) whether the individual has an interest in residential property located in the United Kingdom: s 67A(2) (as so prospectively added). Section 67A applies in relation to any offence under Pt 5 (whether committed before or after the coming into force of this section): s 67A(4) (as so prospectively added).

For the Purposes of s 67A, the following definitions apply. 'Asylum claim' means a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom, or a claim that the claimant would face a real risk of serious harm if removed from the United Kingdom: s 67A(3) (as so prospectively amended). 'Convention rights' means the rights identified as Convention rights by the Human Rights Act 1998 s 1 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**): International Criminal Court Act 2001 s 67A(3) (as so prospectively amended). 'Detained in lawful custody' means: (A) detained in pursuance of a sentence of imprisonment, detention or custody for life or a detention and training order; (B) remanded in or committed to custody by an order of a court; (C) detained pursuant to an order under the Colonial Prisoners Removal Act 1884 s 2 (see **COMMONWEALTH** vol 13 (2009) PARA 849) or a warrant under the Repatriation of Prisoners Act 1984 ss 1, 4A (see **PRISONS** vol 36(2) (Reissue) PARA 555 et seq); (D) detained under the Mental Health Act 1983 Pt 3 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 1694 et seq) or by virtue of an order under the Criminal Procedure (Insanity) Act 1964 s 5 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1265) or the Criminal Appeal Act 1968 ss 6, 14 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARAS 1883, 1889): International Criminal Court Act 2001 s 67A(3) (as so prospectively amended). 'Human rights claim' means a claim that to remove the claimant from, or to require the claimant to leave, the United Kingdom would be unlawful under the Human Rights Act 1998 s 6 (public authority not to act contrary to Convention) as being incompatible with the person's Convention rights: International Criminal Court Act 2001 s 67A(3) (as so prospectively amended). 'Refugee Convention' means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to the Convention (Geneva, 28 July 1951; TS 39 (1954); Cmd 9171) and Protocol (New York, 31 January 1967; TS 15 (1969); Cmd 3906): International Criminal Court Act 2001 s 67A(3) (as so prospectively amended). 'Serious harm' has the meaning given by article 15 of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted: International Criminal Court Act 2001 s 67A(3) (as so prospectively amended). A reference to having leave to enter or remain in the United Kingdom is to be construed in accordance with the Immigration Act 1971 (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**): International Criminal Court Act 2001 s 67A(3) (as so prospectively amended).

9 International Criminal Court Act 2001 s 51(2). 'Person subject to UK service jurisdiction' means a person subject to service law, or a civilian subject to service discipline, within the meaning of the Armed Forces Act 2006 (see **ARMED FORCES**): International Criminal Court Act 2001 s 67(3) (amended by the Armed Forces Act 2006 Sch 16 para 189).

10 For these purposes, 'substantive offence' means an offence other than an ancillary offence: International Criminal Court Act 2001 s 68(4). As to the meaning of 'ancillary offence' see PARA 455 note 5.

11 International Criminal Court Act 2001 s 68(1), (2). Nothing in s 68 is to be read as restricting the operation of any other provision of Pt 5: s 68(5).

12 International Criminal Court Act 2001 s 66(1), (2). This applies unless it is otherwise provided: see s 66(2).

For these purposes, a person has intent: (1) in relation to conduct, where he means to engage in the conduct; and (2) in relation to a consequence, where he means to cause the consequence or is aware that it will occur in the ordinary course of events: s 66(3)(a). 'Knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events: s 66(3)(b).

In interpreting and applying the provisions of s 66, the court must take into account any relevant judgment or decision of the ICC: s 66(4). Account may also be taken of any other relevant international jurisprudence: s 66(4).

13 See the International Criminal Court Act 2001 s 50(2). As to the Elements of Crimes see s 50(3); and the International Criminal Court Act 2001 (Elements of Crimes) (No 2) Regulations 2004, SI 2004/3239.

14 International Criminal Court Act 2001 s 50(5). As to the International Criminal Court see PARA 437.

15 International Criminal Court Act 2001 s 50(5).

16 International Criminal Court Act 2001 s 50(4). Her Majesty may by Order in Council: (1) certify that a reservation or declaration has been made and the terms in which it was made; (2) if any such reservation or declaration is withdrawn (in whole or part), certify that fact and revoke or amend any Order in Council containing the terms of that reservation or declaration: see s 50(4). As to the order that has been made see the International Criminal Court Act 2001 (Reservations and Declarations) Order 2001, SI 2001/2559.

17 Ie the International Criminal Court Act 2001 s 51.

18 International Criminal Court Act 2001 s 65A(1) (s 65A prospectively added by the Coroners and Justice Act 2009 s 70(1), (3). At the date at which this volume states the law no day had been appointed under s 182(5) bringing this section into force). The International Criminal Court Act 2001 s 51 does not apply to a crime against humanity (see PARA 430), or a war crime within the Statute of the ICC art 8.2(b) or (e) (see PARA 431), committed by a person before 1 September 2001 (ie the date on which s 51 came into force) unless, at the time the act constituting that crime was committed, the act amounted in the circumstances to a criminal offence under international law: s 65A(2) (as so prospectively added).

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#### 455. Ancillary offences.

It is an offence against the law of England and Wales for a person to engage in conduct<sup>1</sup> ancillary to an act that if committed in England or Wales would constitute an offence of genocide<sup>2</sup>, crime against humanity<sup>3</sup> or war crime<sup>4</sup>, or would constitute an ancillary offence<sup>5</sup>, but which, being committed or intended to be committed outside England and Wales, does not constitute such an offence<sup>6</sup>. These provisions apply where the conduct in question consists of or includes an act committed: (1) in England or Wales; or (2) outside the United Kingdom<sup>7</sup> by a United Kingdom national<sup>8</sup>, a United Kingdom resident<sup>9</sup> or a person subject to UK service jurisdiction<sup>10</sup>.

Proceedings for an ancillary offence may be brought against a person in England and Wales if he is resident in the United Kingdom at the time the proceedings are brought, and the acts in respect of which the proceedings are brought would have constituted that offence if they had been committed in that part of the United Kingdom<sup>11</sup>.

1 As to the meaning of 'conduct' 454 note 5.

2 As to the meaning of 'genocide' see PARA 429.

3 As to the meaning of 'crime against humanity' see PARA 430.

4 As to the meaning of 'war crime' see PARA 431.

5 The International Criminal Court Act 2001 s 55 (amended by the Serious Crime Act 2007 Sch 6 para 61(2), Sch 7 para 49, Sch 14) provides that, for the purposes of Pt 5 (ss 50-70), references to an 'ancillary offence' are to:

10 (1) aiding, abetting, counselling or procuring the commission of an offence (ie conduct that in relation to an indictable offence would be punishable under the Accessories and Abettors Act 1861 s 8: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 49-51);

11 (2) inciting a person to commit an offence;

12 (3) attempting or conspiring to commit an offence; and for these purposes the reference to an attempt is to conduct amounting to an offence under the Criminal Attempts Act 1981 s 1 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 79), and the reference to conspiracy is to conduct amounting to an offence under the Criminal Law Act 1977 s 1 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 67); or

13 (4) assisting an offender or concealing the commission of an offence; and for these purposes the reference to assisting an offender is to conduct that in relation to a relevant offence would amount to an offence under the Criminal Law Act 1967 s 4(1) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 58), and the reference to concealing an offence is to conduct that in relation to a relevant offence would amount to an offence under s 5(1) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 734).

Note that references to the common law offence of incitement have effect as references to the statutory offence under the Serious Crime Act 2007 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**): see Sch 6 para 42.

6 See the International Criminal Court Act 2001 s 52(1), (2), (3). As from a day to be appointed s 52 applies to conduct in which a person engaged on or after 1 January 1991, and references to an offence include an act or conduct which would not constitute an offence under the law of England and Wales but for this section: s 65A(3) (s 65A prospectively added by the Coroners and Justice Act 2009 s 70(1), (3). At the date at which this volume states the law no such day had been appointed under s 182(5)). As from a day to be appointed any enactment or rule of law relating to an offence ancillary to a relevant Pt 5 offence applies to conduct in which a person

engaged on or after 1 January 1991, and applies even if the act or conduct constituting the relevant Pt 5 offence would not constitute such an offence but for this section: s 65A(5) (as so prospectively added). But s 52, and any enactment or rule of law relating to an offence ancillary to a relevant Pt 5 offence, do not apply to conduct in which the person engaged before 1 September 2001, or conduct in which the person engaged on or after that date which was ancillary to an act or conduct which: (1) was committed or engaged in before that date, and (2) would not constitute a relevant Pt 5 offence, or fall within section 52(2), but for this section, unless, at the time the person engaged in the conduct, it amounted in the circumstances to a criminal offence under international law: s 65A(6) (as so prospectively added). For these purposes a 'relevant Pt 5 offence' means an offence under ss 51, 52 or an offence ancillary to such an offence: s 65A(9) (as so prospectively added).

7 As to the meaning of 'United Kingdom' see PARA 30 note 3.

8 As to the meaning of 'United Kingdom national' see PARA 454 note 7.

9 As to the meaning of 'United Kingdom resident' see PARA 454 note 8.

10 International Criminal Court Act 2001 s 52(4). As to the meaning of 'person subject to United Kingdom service jurisdiction' see PARA 454 note 9.

11 See the International Criminal Court Act 2001 s 68(3).

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#### **456. Trial and punishment of offences of genocide, crimes against humanity and war crimes, and ancillary offences.**

Offences of genocide, crimes against humanity and war crimes<sup>1</sup> and ancillary offences<sup>2</sup> are triable only on indictment<sup>3</sup>. Proceedings must not be instituted except by or with the consent of the Attorney General<sup>4</sup>. If the offence is not committed in England or Wales proceedings may be taken, and the offence is for incidental purposes treated as having been committed, in any place in England or Wales<sup>5</sup>.

A person convicted of an offence involving murder<sup>6</sup>, or an offence ancillary to an offence involving murder, must be dealt with as for an offence of murder or, as the case may be, the corresponding ancillary offence in relation to murder<sup>7</sup>. In any other case, a person convicted of an offence mentioned above is liable to imprisonment for a term not exceeding 30 years<sup>8</sup>.

1    I.e. offences under s 51: see PARA 454. As to the meaning of 'genocide' see PARA 429; as to the meaning of 'crime against humanity' see PARA 430; and as to the meaning of 'war crime' see PARA 431.

2    I.e. offences under the International Criminal Court Act 2001 s 52 (see PARA 455), and offences ancillary to offences under s 51 or s 52.

3    International Criminal Court Act 2001 s 53(1), (2).

4    International Criminal Court Act 2001 s 53(3).

5    International Criminal Court Act 2001 s 53(4).

6    For these purposes, 'murder' means the killing of a person in such circumstances as would, if committed in England or Wales, constitute murder: International Criminal Court Act 2001 s 53(5).

7    International Criminal Court Act 2001 s 53(5). As from a day to be appointed s 53(5), (6) (see the text and note 8) are subject to s 65B (see note 8): s 53(7) (prospectively added by the Coroners and Justice Act 2009 s 70(1), (2)). At the date at which this volume states the law no such day had been appointed.

8    International Criminal Court Act 2001 s 53(6). As from a day to be appointed in the case of a pre-existing E&W offence committed before 1 September 2001, in '30 years' is to be read as '14 years': s 65B(1) (prospectively added by the Coroners and Justice Act 2009 s 70(1), (3)). At the date at which this volume states the law no such day had been appointed under s 182(5)). In the case of an offence of the kind mentioned in the International Criminal Court Act 2001 s 55(1)(d) (see PARA 455) which is ancillary to a pre-existing E&W offence committed before 1 September 2001, nothing in s 53(5) and (6) disapplies the penalties provided for in the Criminal Law Act 1967 ss 4, 5 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 58, 734): s 65B(2) (as so prospectively added). For these purposes 'pre-existing E&W offence' means: (1) an offence under the International Criminal Court Act 2001 s 51 (see PARA 454) on account of an act constituting genocide, if at the time the act was committed it also amounted to an offence under the Genocide Act 1969 s 1; (2) an offence under section 51 on account of an act constituting a war crime, if at the time the act was committed it also amounted to an offence under the Geneva Conventions Act 1957 s 1 (grave breaches of the Conventions); (3) an offence of a kind mentioned in s 55(1)(a) to (c) (see PARA 455) which is ancillary to an offence within para (1) or (2) above: s 65B(5) (as so prospectively added).

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#### **457. Offences in relation to the International Criminal Court.**

The International Criminal Court (the 'ICC')<sup>1</sup> has jurisdiction over the following offences against its administration of justice when committed intentionally: (1) giving false testimony when under an obligation to tell the truth; (2) presenting evidence that the party knows is false or forged; (3) corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence; (4) impeding, intimidating or corruptly influencing an official of the ICC for the purpose of forcing or persuading the official not to perform, or to perform improperly, his duties; (5) retaliating against an official of the ICC on account of duties performed by that or another official; (6) soliciting or accepting a bribe as an official of the ICC in connection with his official duties<sup>2</sup>.

A person intentionally committing any of the above acts may be dealt with as for the corresponding domestic offence committed in relation to a superior court in England and Wales<sup>3</sup>. In interpreting and applying the relevant provisions, the court must take into account any relevant judgment or decision of the ICC, and account may also be taken of any other relevant international jurisprudence<sup>4</sup>.

These provisions and, so far as may be necessary for the purposes of these provisions, the enactments and rules of law relating to the corresponding domestic offences apply to acts committed: (a) in England or Wales; or (b) outside the United Kingdom<sup>5</sup> by a United Kingdom national<sup>6</sup>, a United Kingdom resident<sup>7</sup> or a person subject to UK service jurisdiction<sup>8</sup>. If an offence under these provisions, or an offence ancillary to such an offence, is not committed in England or Wales, proceedings may be taken, and the offence is for incidental purposes to be treated as having been committed, in any place in England or Wales<sup>9</sup>.

Proceedings for an offence under these provisions, or for an offence ancillary to such an offence, must not be instituted except by or with the consent of the Attorney General<sup>10</sup>.

A person is regarded as committing an act or crime mentioned above only if the material elements are committed with intent and knowledge<sup>11</sup>.

1 As to the International Criminal Court see PARA 437.

2 See the International Criminal Court Act 2001 s 54(7), Sch 9 (which sets out the Rome Statute of the International Criminal Court (17.7.98) (UN Doc A/CONF 183/9; 37 ILM (1998), 999) (the 'ICC Statute') art 70.1). As to the ICC Statute see PARA 422 et seq.

3 International Criminal Court Act 2001 s 54(1). The corresponding domestic offences are: (1) in relation to head (1) in the text, an offence against the Perjury Act 1911 s 1(1) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 712); (2) in relation to head (3) in the text, an offence against the Criminal Justice and Public Order Act 1994 s 51 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 726) or at common law; (3) in relation to head (2), (4), (5) or (6) in the text, an offence at common law: International Criminal Court Act 2001 s 54(3).

4 International Criminal Court Act 2001 s 54(2).

5 As to the meaning of 'United Kingdom' see PARA 30 note 3.

6 As to the meaning of 'United Kingdom national' see PARA 454 note 7.



7 As to the meaning of 'United Kingdom resident' see PARA 454 note 8.

8 International Criminal Court Act 2001 s 54(4). As to the meaning of 'person subject to United Kingdom service jurisdiction' see PARA 454 note 9.

9 International Criminal Court Act 2001 s 54(6).

10 International Criminal Court Act 2001 s 54(5).

11 International Criminal Court Act 2001 s 66(1), (2). This applies unless it is otherwise provided: see s 66(2).

For these purposes, a person has intent: (1) in relation to conduct, where he means to engage in the conduct; and (2) in relation to a consequence, where he means to cause the consequence or is aware that it will occur in the ordinary course of events: s 66(3)(a). 'Knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events: s 66(3)(b).

In interpreting and applying the provisions of s 66, the court must take into account any relevant judgment or decision of the ICC: s 66(4). Account may also be taken of any other relevant international jurisprudence: s 66(4).

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#### **458. Responsibility of commanders and other superiors.**

A military commander, or a person effectively acting as a military commander, is responsible for offences<sup>1</sup> committed by forces under his effective command and control, or (as the case may be) his effective authority and control, as a result of his failure to exercise control properly over such forces where: (1) he either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offences; and (2) he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution<sup>2</sup>.

With respect to superior and subordinate relationships not described above, a superior is responsible for offences committed by subordinates under his effective authority and control, as a result of his failure to exercise control properly over such subordinates, where: (a) he either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such offences; (b) the offences concerned activities that were within his effective responsibility and control; and (c) he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution<sup>3</sup>.

A person responsible under these provisions for an offence is regarded as aiding, abetting, counselling or procuring the commission of the offence<sup>4</sup>.

In interpreting and applying these provisions the court must take into account any relevant judgment or decision of the International Criminal Court (the 'ICC')<sup>5</sup>, and account may also be taken of any other relevant international jurisprudence<sup>6</sup>.

Nothing in these provisions is to be read as restricting or excluding any other liability of the commander or superior, or the liability of persons other than the commander or superior<sup>7</sup>.

1    The offences under the International Criminal Court Act 2001 Pt 5 (ss 50-70), and offences ancillary to such offences: s 65(1). As from a day to be appointed, in so far as it has effect in relation to relevant Pt 5 offences s 65 applies to failures to exercise control of the kind mentioned in s 65(2) or (3) which occurred on or after 1 January 1991, and applies even if the act or conduct constituting the relevant Part 5 offence would not constitute such an offence but for this section: s 65A(8) (prospectively added by the Coroners and Justice Act 2009 s 70(1), (3). At the date at which this volume states the law no such day had been appointed under s 182(5)). But the International Criminal Court Act 2001 s 65, so far as it has effect in relation to relevant Pt 5 offences, does not apply to a failure to exercise control of the kind mentioned in s 65(2) or (3) which occurred before 1 September 2001 unless, at the time the failure occurred, it amounted in the circumstances to a criminal offence under international law: s 65A(9) (as so prospectively added).

2    International Criminal Court Act 2001 s 65(2).

3    International Criminal Court Act 2001 s 65(3).

4    International Criminal Court Act 2001 s 65(4).

5    International Criminal Court Act 2001 s 65(5). As to the International Criminal Court see PARA 437.

6    International Criminal Court Act 2001 s 65(5).

7    International Criminal Court Act 2001 s 65(6).



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## **15. INTERNATIONAL ECONOMIC AND TRADE LAW; ALIENS**

### **(1) INTERNATIONAL FINANCIAL AND TRADE ORGANISATIONS**

#### **459. International financial organisations.**

The United Kingdom is a member of a number of international financial and economic institutions which are specialised agencies of the United Nations<sup>1</sup>. The United Kingdom is also party to agreements establishing international development banks<sup>2</sup>, including the Asian Development Bank<sup>3</sup>.

1 As to the financial and economic specialised agencies of the United Nations see PARA 533. As to European financial and economic co-operation see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1396.

2 As to international development banks see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1391 et seq.

3 As to the Asian Development Bank see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1389 et seq.

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#### **460. General Agreement on Tariffs and Trade.**

After the 1939-45 war, international conventions and agreements, to which the United Kingdom is a party, were concluded on subjects which include customs duties<sup>1</sup>. In 1947 the General Agreement on Tariffs and Trade was concluded at Geneva, and has since been revised from time to time<sup>2</sup>.

1 As to customs duties see **CUSTOMS AND EXCISE** vol 12(2) (2007 Reissue) PARA 1 et seq.

2 See the General Agreement on Tariffs and Trade (Geneva, 30 October 1947; 55-61 UN TS; Cmd 7258); Supplementary Agreement between Great Britain and the United States of America (Geneva, 30 October 1947; TS 87 (1947); Cmd 7276). The most recent agreement is that of 1994 (GATT 1994). The GATT 1994 agreement can be found annexed to the Agreement establishing the World Trade Organisation: see the Agreement establishing the World Trade Organisation (Marrakesh, 15 April 1994; TS 57 (1996) Cm 3277) Annex 1A. As to the World Trade Organisation see PARA 461.

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#### **461. World Trade Organisation.**

The World Trade Organisation was established in 1994<sup>1</sup> to facilitate the implementation, administration and operation of the General Agreement on Tariffs and Trade<sup>2</sup> and of multilateral trading agreements<sup>3</sup>. The World Trade Organisation has legal personality, and is accorded by each of its members such legal capacity as may be necessary for the exercise of its functions<sup>4</sup> and such privileges and immunities as are necessary for the exercise of its functions<sup>5</sup>. It is not a specialised agency of the United Nations<sup>6</sup>. However, the World Trade Organisation is required to co-operate, as appropriate, with the International Monetary Fund<sup>7</sup> and the International Bank for Reconstruction and Development<sup>8</sup>. The World Trade Organisation may enter into arrangements for consultation and co-operation with other international organisations<sup>9</sup>.

The World Trade Organisation consists of: (1) the Ministerial Conference (with representatives of all members meeting at least once every two years)<sup>10</sup>; (2) the General Council (composed of representatives of all members)<sup>11</sup>, which also convenes to discharge the responsibilities of the Dispute Settlement Body<sup>12</sup> and the Trade Policy Review Body<sup>13</sup>; (3) the Councils for Trade in Goods, Trade in Services and Trade-Related Aspects of Intellectual Property Rights<sup>14</sup>; and (4) Committees on Trade and Development, Balance-of-Payments Restrictions and the Budget, Finance and Administration<sup>15</sup>. At meetings of the Ministerial Conference and the General Council each member of the World Trade Organisation has one vote<sup>16</sup>. There is a Director General and a Secretariat<sup>17</sup>.

1 Agreement establishing the World Trade Organisation (Marrakesh, 15 April 1994; TS 57 (1996) Cm 3277). The Agreement entered into force on 1 January 1995. The European Union is a member, its individual member states are not. At meetings of World Trade Organisation organs, the European Union has the number of votes equal to the number of member states: art IX para 1. As to membership of the World Trade Organisation see arts XI (original membership), XII (accession).

2 I.e. the General Agreement on Tariffs and Trade (Geneva, 30 October 1947; 55-61 UN TS; Cmd 7258). As to the General Agreement on Tariffs and Trade see PARA 460.

3 See the Agreement establishing the World Trade Organisation art III.

4 Agreement establishing the World Trade Organisation art VIII para 1.

5 Agreement establishing the World Trade Organisation art VIII para 2. As to privileges and immunities of World Trade Organisation officials and representatives see art VIII paras 3, 4. As to immunities and privileges of international organisations, including the World Trade Organisation, see PARA 309.

6 As to specialised agencies of the United Nations see PARA 533.

7 As to the International Monetary Fund see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1391.

8 Agreement establishing the World Trade Organisation art III para 5. As to the International Bank for Reconstruction and Development see PARA 533.

9 Agreement establishing the World Trade Organisation art V.

10 See the Agreement establishing the World Trade Organisation art IV para 1.

11 See the Agreement establishing the World Trade Organisation art IV para 2.

12 See the Agreement establishing the World Trade Organisation art IV para 3.

- 13 See the Agreement establishing the World Trade Organisation art IV para 4.
- 14 See the Agreement establishing the World Trade Organisation art IV para 5. These councils may establish subsidiary bodies: art IV para 6.
- 15 See the Agreement establishing the World Trade Organisation art IV para 7.
- 16 Agreement establishing the World Trade Organisation art IX para 1. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter will be decided by voting: art IX para 1. Decisions of the Ministerial Conference and the General Council must be taken by a majority of the votes cast, unless otherwise provided in the Agreement establishing the World Trade Organisation or in the relevant multilateral trade agreement: art IV para 1. Decisions by the General Council when convened as a Dispute Settlement Body must be taken by consensus: see art IX para 1 note 3. The Dispute Settlement Body is deemed to have decided by consensus a matter submitted for its consideration, if no member present at the meeting of the Dispute Settlement Body when the decision is taken objects to the proposed decision: Annex 2 art 2 para 4 note 1.
- 17 See the Agreement establishing the World Trade Organisation art VI.

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## (2) TREATMENT OF ALIENS GENERALLY

### 462. Admission of aliens.

In customary international law a state is free to refuse the admission of aliens<sup>1</sup> to its territory<sup>2</sup>, or to attach whatever conditions it pleases to their entry<sup>3</sup>. This discretion may be limited by treaty<sup>4</sup>. It is usual, when admitting an alien, to require the production of a passport, or in some cases a visa<sup>5</sup>.

1 As to aliens in English law see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

2 As to statehood and territory see PARA 32 et seq.

3 See 1 Oppenheim's International Law (9th Edn) pp 897-900; *A-G for Canada v Cain* [1906] AC 542 at 546. For the present law of the United Kingdom with respect to immigration see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**.

4 See eg the Treaty on the Functioning of the European Union (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) providing at art 45 for free movement of workers within the European Community, and at art 49 for the prohibition of restrictions on the freedom of establishment of nationals of a member state in the territory of another member state. The Treaty was formerly known as the Treaty Establishing the European Community; it has been renamed and its provisions renumbered: see PARA 304 note 1. See also the European Convention on Establishment (Paris, 13 December 1955; TS 1 (1971); Cmnd 4573), which provides that each of the states parties must facilitate the entry into its territory by nationals of other states parties for the purpose of temporary visits and permit those persons to travel freely within its territory, except where this would be contrary to public order, national security, public health or morality: art 1. Further, subject to economic and social conditions, each contracting state must facilitate the prolonged or permanent residence of such persons in its territory: art 2. For an example of a bilateral treaty see the Treaty of Commerce, Establishment and Navigation with Japan (London, 14 November 1962; TS 53 (1963); Cmnd 2085) under which each state grants most favoured nation treatment in this respect to nationals of the other. As to bilateral investment treaties see PARA 481 et seq.

5 As to passports see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 78. The United Kingdom has concluded numerous agreements with other states for the mutual abolition of visas.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/15. INTERNATIONAL ECONOMIC AND TRADE LAW; ALIENS/(2) TREATMENT OF ALIENS GENERALLY/463. International minimum standard.

#### 463. International minimum standard.

As a general rule, if a state chooses to admit an alien<sup>1</sup> into its territory it must conform in its treatment of him to the international minimum standard<sup>2</sup>. The precise content of the standard is a matter for debate. According to the formulation most frequently referred to, to breach the standard the conduct in question would have to amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency<sup>3</sup>. However, it is commonly recognised that the standard has evolved since this formulation<sup>4</sup>. It has also been held that although the application of the standard may vary from case to case, it requires that the state should accord treatment which measures up to the ordinary standards of civilisation<sup>5</sup>. Although an alien must take the foreign country as he finds it and is thus liable to suffer the political vicissitudes of life in that country and to share to that extent the fortunes of its citizens<sup>6</sup>, equality of treatment of the alien with that state's citizens does not conform with the international minimum standard if the state treats its own nationals in a manner which falls below the standard of civilisation<sup>7</sup>. This international standard applies in respect of fundamental human rights, such as the right to life and integrity of persons<sup>8</sup>, and not to political rights, in respect of which an alien can only expect equality of treatment, or even less than equality, with that accorded to the state's own nationals<sup>9</sup>. It also comprises protection against denials of justice<sup>10</sup>.

1 See PARA 462. As to aliens in English law see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

2 See 1 Oppenheim's International Law (9th Edn) pp 897-900.

3 *Neer Case* 4 RIAA 60 at 61, 62 (1926). See also the *Chapman Case* 4 RIAA 632 (1930). In the context of the protection of foreign investors, see generally Dolzer and Schreuer *Principles of International Investment Law* (1st Edn, 2008) pp 11-17. There is an ongoing debate as to whether the fair and equitable treatment standard that is frequently contained in bilateral investment treaties comprises anything more than the international minimum standard: see PARA 483.

4 See eg *Mondev International Ltd v United States of America* ICSID Case No ARB (AF)/99/2, Award of 11 October 2002, 42 ILM 85, 6 ICSID Rep 192 (2004) para 125; *ADF v United States of America* ICSID Case No ARB(AF)/00/1, Award of 9 January 2003, 6 ICSID Rep 470 (2004) para 179.

5 *Roberts Case* 4 RIAA 77 (1926); *Hopkins Case* 4 RIAA 41 (1926). The state must at least use the means at its disposal to look after an alien and deal with him in accordance with natural justice: *Chattin Case* 4 RIAA 282 (1927). The justification for the manner of treatment of an alien may depend to some extent upon the conditions existing at the time and the resources available to the state: *Janes Case* 4 RIAA 82 (1926). The standard has been held to comprise a due diligence obligation to accord protection and security to the property of an alien: see eg *Asian Agricultural Products Ltd (AAPL) v Sri Lanka* ICSID Case No ARB/87/3, Award of 27 June 1990, 30 ILM (1991) 577, 4 ICSID Rep 245 (1997); *Noble Ventures Inc v Romania* ICSID Case No ARB/01/11, Award of 12 October 2005, para 164.

6 *Starrett Housing Corp v Iran* 4 Iran-US CTR 122 (1983); and *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Republic of Pakistan* ICSID Case No ARB/03/29, Award of 27 August 2009 (in the context of protections under a bilateral investment treaty). See also *Rosa Gelbtrunk Case* Foreign Relations of the United States (1902) 876 at 877-878; *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 644 (1925). A resident alien owes a local allegiance to the state of his residence sufficient to convict him of treason: see *De Jager v A-G of Natal* [1907] AC 326, 5 BILC 74, PC; *Joyce v DPP* [1946] AC 347, HL. In English law, the plea of act of state is not available to the Crown by way of defence to a claim in tort by a foreign friendly person: *Johnstone v Pedlar* [1921] 2 AC 262, HL. As to acts of state see PARA 22 et seq.

7 This was stated in the *Roberts Case* 4 RIAA 77 (1926); *Hopkins Case* 4 RIAA 41 (1926). The sufficiency of national treatment was held to be the rule of international law in some early decisions: *Canevaro Case* 11 RIAA 397 (1912); *Cadenhead Case* 6 RIAA 40 (1914); *Standard Oil Co Case* 2 RIAA 781 at 794 (1926). However, the Permanent Court of International Justice stated that a measure of treatment of aliens which is prohibited by international law does not become legitimate merely by virtue of its being meted out to nationals: *Certain German Interests in Polish Upper Silesia* PCIJ Ser A No 7 at 33 (1926). This is consistent with the well-established principle that a state cannot rely on its own internal law to defeat an international law obligation.

8 It is probable that the international minimum standard demands that a state should accord to aliens the fundamental personal rights and freedoms contained in international instruments respecting human rights: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq. See also the United Nations General Assembly Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live: General Assembly Resolution 144 (XL) GAOR 40 Sess Supp 53, p 252. The wanton killing of an alien (*Youmans Case* 4 RIAA 110 (1926)), false imprisonment and ill-treatment in prison (*Roberts Case* 4 RIAA 77 (1926)), or the looting and damaging of property (The '*Zafiro*' 6 RIAA 160 (1925)) have been held to amount to violation of the international minimum standard. See also the developing jurisprudence in relation to art 1105 of the North Atlantic Free Trade Agreement ('NAFTA') (available at the date at which this volume states the law on the NAFTA Secretariat website at [www.nafta-sec-alena.org](http://www.nafta-sec-alena.org)) which (as officially interpreted by the NAFTA Free Trade Commission) provides for the treatment required by the customary international law minimum standard of treatment of aliens.

9 As to political and property rights see PARAS 471-472.

10 As to denial of justice see PARA 464.

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#### **464. Denial of justice.**

Denial of justice refers to a failure by the courts of a state to ensure fundamental fairness in the administration of justice<sup>1</sup>, such as fundamental breaches of due process<sup>2</sup>. The failure may equally be by administrative bodies of a state that are engaged in the administration of justice<sup>3</sup>. A denial of justice engages the international responsibility of a state, but only where there has been a failure to exhaust local remedies<sup>4</sup>.

1 This has been termed 'procedural denial of justice' (see O'Connell's International Law (2nd Edn) 947), although denial of justice may now be regarded as always procedural in nature: see Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 7, 98. See also Fitzmaurice 'The Meaning of the term Denial of Justice' 13 BYIL 93. The threshold is a high one for claimants to meet: see eg *Mondev International Ltd v United States of America* ICSID Case No ARB (AF)/99/2, Award of 11 October 2002, 42 ILM 85, 6 ICSID Rep 192 (2004), where the tribunal considered that 'the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable'. See also *Loewen Group Inc and Raymond L Loewen v United States of America* ICSID Case No ARB (AF)/98/3, Award of 26 June 2003, 42 ILM (2003) 811, 7 ICSID Rep 442 (2005). The term 'denial of justice' was at one stage used in a way that was interchangeable with 'state responsibility' in general, but this is no longer common practice.

2 See eg *Loewen Group Inc and Raymond L Loewen v United States of America* ICSID Case No ARB (AF)/98/3, Award of 26 June 2003, 42 ILM (2003) 811, 7 ICSID Rep 442 (2005), where the tribunal found that by any standards the trial of the claimants in the courts of Mississippi had been a disgrace and that by any standards the trial judge had failed to afford due process. The tribunal nonetheless dismissed the claim on jurisdictional grounds. See also Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 180-206 (also considering discrimination, corruption, arbitrariness, retroactive applications of laws, gross incompetence and pretence of form).

3 See Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 44-53; Fitzmaurice 'The Meaning of the term Denial of Justice' 13 BYIL 93 at 94. See also *Waste Management Inc v United Mexican States* ICSID Case No ARB(AF)/00/3, Award of April 30, 2004, 43 ILM (2004) 967 para 98 (considering conduct of the state in breach of the international minimum standard (as reflected in art 1105 of the North Atlantic Free Trade Agreement ('NAFTA')) (available at the date at which this volume states the law on the NAFTA Secretariat website at [www.nafta-sec-alena.org](http://www.nafta-sec-alena.org))) that involves a lack of due process leading to an outcome which offends judicial propriety; eg manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process).

4 An alien who has been injured by a denial of justice must exhaust any remedies which may be available in superior courts: see PARA 405. This follows where the claim is brought on the basis of diplomatic protection, but also as a necessary element of the international wrong ie as a substantive as well as a procedural requirement: see *Loewen Group Inc and Raymond L Loewen v United States of America* ICSID Case No ARB (AF)/98/3, Award of 26 June 2003, 42 ILM (2003) 811, 7 ICSID Rep 442 (2005) paras 150-156 (the purpose of the requirement that a decision of a lower court must be challenged through the judicial process is to afford the state the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision). See also Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 100-130.

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#### 465. Refusal of access to courts; delay.

A state commits a denial of justice if an alien is refused access to the courts<sup>1</sup> for the protection and enforcement of his rights<sup>2</sup>. The same is true if it is established that there has been an unconscionable delay on the part of the courts<sup>3</sup>, or where the court which is theoretically open to aliens never meets or, if convened, reaches no decision<sup>4</sup>. Application of rules of domestic law permitting non-disclosure of documents is not a denial of justice<sup>5</sup>.

1 As to the meaning of 'denial of justice' see PARA 464. As to aliens in English law see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13. See also PARA 462 et seq.

2 *Ambatielos Claim* 12 RIAA 83 (1956). See also *Ruden & Co Case* (1869) Moore Int Arb 1653 (refusal to entertain a claim because the government had forbidden judgment to be pronounced against the state treasury); *Tagliaferro Case* 10 RIAA 592 (1903). This also includes a refusal to allow delivery of copies of documents which are essential to the case: *Ballistini Case* 10 RIAA 18 (1903). See also Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 134-146. Note that where a claim cannot be brought because the defendant benefits from sovereign immunity, there is no breach of art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (commonly referred to as the 'European Convention on Human Rights'): see *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2006] UKHL 26, [2007] 1 AC 270, [2007] 1 All ER 113; and *Al-Adsani v United Kingdom* (2001) 34 EHRR 273, ECtHR. In *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* both Lord Bingham (at [14]) and Lord Hoffman (at [64]) expressed doubts as to whether art 6 of the European Convention on Human Rights was engaged (cf the conclusion of the majority in *Al-Adsani v United Kingdom*) on the basis that a state cannot be said to deny access to a court if it has no access to give. The provisions of the European Convention on Human Rights are set out in the Human Rights Act 1998 Sch 1: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 123 et seq.

3 *Fabiani Case* (1896) Moore Int Arb 4877. See also the *Cotesworth and Powell Case* (1875) Moore Int Arb 2050 (refusal by a judicial authority to exercise its functions, to give a decision on the request submitted to it and also wrongful delay in giving judgment); *Medina Case* (1860) Moore Int Arb 2315; *Orinoco Steamship Co* 9 RIAA 180 (1903); *Rudloff Case* 9 RIAA 244 (1903); *Bullis Case* 9 RIAA 231 (1903); *Interoceanic Rly of Mexico Case* 5 RIAA 178 (1931); *El Oro Mining and Rly Co Ltd* 5 RIAA 191 (1931). States have been held liable for delays in respect of investigation of charges against aliens: *Jones Case* (1880) Moore Int Arb 3253 (alien acquitted after process lasting three years). See also the *Chattin Case* 4 RIAA 282 (1927); *Parrish Case* 4 RIAA 314 (1927); *Dyches Case* 4 RIAA 458 (1929). Everything depends, however, on the circumstances, including the complexity of the case. A state was held not liable in, for example, the *White Case* (1864) Moore Int Arb 4967 (nine months' delay in trial of alien); *McCurdy Case* 4 RIAA 418 (1929). See also Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 177-178.

4 *Fabiani Case* (1896) Moore Int Arb 4877 (where the court also encouraged a debtor's unjustified delay). For a refusal to recognise the locus standi of the claimant see the *Venable* 4 RIAA 219 (1927). See also Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 176-177. As to illegitimate assertions of jurisdiction, governmental interference and manipulation of the composition of courts see Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 157-164, 178-179.

5 *Ambatielos Claim* 12 RIAA 83 (1956). In *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2009] 4 All ER 1045, [2009] 2 WLR 512 at [265] Lord Mance noted that there appeared to be a considerable resemblance between the concept of flagrant unfairness adopted by the European Court of Human Rights and the concept of denial of justice in public international law generally.

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#### 466. Erroneous and unjust decisions.

A state is not responsible merely because a decision given in its courts<sup>1</sup> in a case brought by or against an alien<sup>2</sup> is erroneous in terms of its own municipal law<sup>3</sup>. It may, however, incur responsibility if the decision is so erroneous that no properly constituted court could honestly have arrived at such a decision, or where it is due to corruption or pressure of the executive or legislative organs of the state<sup>4</sup>; discrimination against foreigners<sup>5</sup>; procedure so faulty as to exclude all reasonable possibility of a just decision<sup>6</sup>; or the conduct of proceedings being such that a judgment pronounced and executed is in open violation of the law or otherwise manifestly iniquitous<sup>7</sup>. There is a presumption in favour of the due exercise of the judicial process<sup>8</sup>.

1 As to the position of administrative bodies of a state that are engaged in the administration of justice see PARA 464.

2 See PARA 462 et seq. As to aliens in English law see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

3 See *Azinian v United Mexican States* ICSID Case No ARB(AF)/97/2, Award of 1 November 1999, 39 ILM (2000) 537, 5 ICSID Rep 269 (2002) at paras 97-100. See also Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 73-81; Fitzmaurice 'The Meaning of the Term Denial of Justice' (1932) 13 BYIL 93 at 111. See the Reply of the United Kingdom government to the Questionnaire of the League of Nations Preparatory Commission for the Hague Codification Conference 1930, League of Nations Doc C, 75, M 69, 1929 V, 44 at 49; *Martini Case* 2 RIAA 975 at 987 (1930). See *Putnam Case* 4 RIAA 151 at 153 (1927); *Cotesworth and Powell Case* (1875) Moore Int Arb 2050 at 2083; *Garcia and Garza Case* 4 RIAA 119 at 123, 126 (1926); *Gordon* 4 RIAA 586 at 590 (1930); *Salem Case* 2 RIAA 1161 at 1202 (1932); *Denham Case* 6 RIAA 312 (1933). A mere difference in procedure between different legal systems does not give rise to a denial of justice per se.

4 *Fabiani Case* (1896) Moore Int Arb 4877 at 4882, 4901; *Robert E Brown Case* 6 RIAA 120 (1923) (obstructions on the part of the executive, legislature and judiciary). An unjust judgment raises a strong presumption of dishonesty on the part of the court. It may even afford conclusive evidence, if the injustice is sufficiently flagrant, so that the judgment is of a kind which no honest or competent court could possibly have given: see Fitzmaurice, 'The Meaning of the Term Denial of Justice', (1932) 13 BYIL 93 at 112-113; and Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 89, 98. As to corruption or pressure of the executive or legislative organs of the state see Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 157-167, 195-196.

5 *Loewen Group Inc and Raymond L Loewen v United States of America* ICSID Case No ARB (AF)/98/3, Award of 26 June 2003, 42 ILM (2003) 811, 7 ICSID Rep 442 (2005) at para 135; *Salem Case* 2 RIAA 1161 at 1202 (1932).

6 *Loewen Group Inc and Raymond L Loewen v United States of America* ICSID Case No ARB (AF)/98/3, Award of 26 June 2003, 42 ILM (2003) 811, 7 ICSID Rep 442 (2005) at paras 53, 119-137. See also Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 180-192. See the Reply of the United Kingdom Government to the Questionnaire of the League of Nations Preparatory Commission for the Hague Codification Conference 1930 point 5. This includes the use of menaces or threats and secrecy. As to the trial of the Metropolitan-Vickers Co Employees in Moscow in 1933 see Correspondence etc, Parliamentary Paper Russia No 12 (Cmd 4286, 4290) (1933). It also includes refusal to hear evidence on behalf of the accused in a criminal trial (*Chattin Case* 4 RIAA 282 (1927)); failure to inform an alien of a charge against him (*Way* 4 RIAA 391 (1928); *Faulkner Case* 4 RIAA 67 (1926)); refusal to summon eye witnesses (*Morton* 4 RIAA 428 (1929)); and probably refusal to allow legal assistance and the services of an interpreter (cf the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 which expressly provides for these: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134).

7 See the *Cotesworth and Powell Case* (1875) Moore Int Arb 2050 at 2083; *Driggs Case* (1885) Moore Int Arb 3125 (criminal trial of an alien). Punishment in contravention of the provisions of the local law amounts to a

denial of justice: *Rogé Case* 10 RIAA 13 (1903). See also the *Ballistini Case* 10 RIAA 18 (1903). Trial by an illegally constituted court is a denial of justice: *Davy Case* 9 RIAA 467 (1903). The final interpretation of a state's own laws must, as a general rule, be a matter for its own courts: *García and Garza Case* 4 RIAA 119 (1926); see *Serbian Loans* PCIJ Ser A No 20, at 46-47 (1929); and *Brazilian Loans* PCIJ Ser A No 21, at 120 (1929). However, the international tribunal may overrule the local courts and disregard the decision if the latter has clearly misinterpreted the local law: *De Sabla Case* 6 RIAA 358 (1933); *Solomon Case* 6 RIAA 370 (1933).

For the right of an accused alien to communicate with the consul of his own state see art 36(1) of the Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmdr 5219); and *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12.

8 *Interoceanic Rly of Mexico Case* 5 RIAA 178 (1931).

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#### **467. Refusal to execute judgment.**

A refusal or other unjustified failure to execute a judgment favourable to an alien in a civil case may constitute a denial of justice<sup>1</sup>. This may arise from the alien's inability to recover damages from the defendant by reason of an amnesty granted him by the state<sup>2</sup>.

1 *Interoceanic Rly of Mexico Case* 5 RIAA 178 (1931); *Montano Case* (1863) Moore Int Arb 1630; *Bethune Case* 6 RIAA 32 (1914) (court clerk embezzled the funds which the court had ordered to be paid to the claimant); *Fabiani Case* (1896) Moore Int Arb 4877 at 4899; and see Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 168-170. See also Application 58263/00 *Timofeyev v Russia* [2003] ECHR 58263/00 at 40 (concerning art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). As to the meaning of 'denial of justice' see PARA 464. As to aliens in English law see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

2 *Cotesworth and Powell Case* (1875) Moore Int Arb 2050 at 2085; *Montijo Case* (1875) Moore Int Arb 1421 at 1438. However, see also *Pringle (Santa Isabel Claims) ((USA) v United Mexican States)* 4 RIAA 783 (1926). As to aliens in English law see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13. See also PARA 462 et seq.

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#### 468. Internationally erroneous decisions.

As a matter of rules on attribution, the conduct of any state organ is to be considered an act of that state under international law, including where the organ exercises judicial functions<sup>1</sup>. A state incurs responsibility if a decision of its courts is inconsistent with a treaty obligation of the state<sup>2</sup>, its international competence<sup>3</sup> or an international award binding on the state<sup>4</sup>. This is, however, a separate matter to denial of justice<sup>5</sup>.

1 Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 4(1), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2); and PARA 338. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* ICJ Reports 1999, 62 at 87 (para 62).

2 Eg when proceedings in a court conflict with the provisions of a treaty calling for the dispensing of particular treatment to an alien: *Van Bokkelen Case* (1888) Moore Int Arb 1807; *Yuille Shortridge Case* 2 Lapradelle and Politis, Recueil des Arbitrages Internationaux 78 (1861).

3 This would include an assumption of jurisdiction in a case in which a court has no jurisdiction over an alien by international law: *Costa Rica Packet Case* (1895) 89 BFSP 1181 (arrest and trial of British captain for offence allegedly in Dutch waters; proved that the act took place on the high seas); *Lotus Case* PCIJ Ser A No 10 (1927) (where this was assumed). If there is a wrongful assumption of jurisdiction the fact that it was taken in error may be no defence: *Coquitlam* 6 RIAA 45 (1920).

4 See eg *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America) (Mexico v United States of America)* ICJ Reports, 19 January 2009 (paras 44, 52-53), where the failure of the Texan courts to give effect to the International Court's provisional measures order of 16 July 2008 led to a breach of international law by the United States. See also *Martini Case* 2 RIAA 975 (1930) (dealing with a judgment contrary to an earlier award of 1905 (see 10 RIAA 644)); *Saipem SpA v People's Republic of Bangladesh* ICSID Case No ARB/05/7, Award of 30 June 2009 (failure to enforce an arbitral award).

5 See eg Paulsson *Denial of Justice in International Law* (1st Edn, 2005) pp 84-85.



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#### 469. Failure to punish offences.

A state may incur international responsibility as a matter of customary international law<sup>1</sup> if it fails to take reasonable steps to apprehend<sup>2</sup>, prosecute<sup>3</sup> and punish<sup>4</sup> offences against aliens<sup>5</sup>. In such a case the state is responsible for its own wrong, committed by its own agents, and not because of complicity in the wrong committed by the culprit<sup>6</sup>.

1 Liability may also be established pursuant to treaty, in particular by reference to the investigative duty under arts 2 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969): see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 122 et seq).

2 If reasonable efforts have been made to apprehend or prosecute the culprit, the state is not liable: see the *Sevey Case* 4 RIAA 474 (1929) (delay of four hours in arriving on the scene of the crime); *Costello Case* 4 RIAA 496 (1929) (insufficient evidence given to authorities); *Willis Case* 4 RIAA 544 (1929); *Sturtevant Case* 4 RIAA 665 (1930). But it will be liable if its failure to do so after some time is unexplained: see the *Massey Case* 4 RIAA 155 (1927); *Richards Case* 4 RIAA 275 (1927); *Kling Case* 4 RIAA 575 (1930); *Austin Case* 4 RIAA 623 (1930). It will be liable if there have been only dilatory measures in tracking down the culprit or investigating a criminal offence: *Janes Case* 4 RIAA 82 (1926); *Neer Case* 4 RIAA 60 (1926); *Youmans Case* 4 RIAA 110 (1926); *Massey Case*; *Roper Case* 4 RIAA 145 (1927); *Boyd Case* 4 RIAA 380 (1928); *Canahl Case* 4 RIAA 389 (1928); *Corcoran Case* 4 RIAA 470 (1929); *Almaguer Case* 4 RIAA 523 (1929); *Tribolet Case* 4 RIAA 598 (1930); *Gorham Case* 4 RIAA 640 (1930).

3 An inordinate lapse of time before the culprit is brought to trial or negligence, laxity or undue delay in his prosecution may engage the state's responsibility: see *Janes Case* 4 RIAA 82 (1926); *Swinney Case* 4 RIAA 98 (1926); *Roper Case* 4 RIAA 145 (1927); *Stephens Case* 4 RIAA 265 (1927); *Galvan Case* 4 RIAA 273 (1927); *Richards Case* 4 RIAA 275 (1927); *Chase Case* 4 RIAA 337 (1928); *Mecham Case* 4 RIAA 440 (1929); *Munroe Case* 4 RIAA 538 (1929). An eight months' delay in criminal proceedings did not impose liability: see the *McCurdy Case* 4 RIAA 418 (1929). Merely to arrest the culprit does not exonerate the state: *Swinney Case* 4 RIAA 98 (1926); *Gorham Case* 4 RIAA 640 (1930); *East Case* 4 RIAA 646 (1930); *Mead Case* 4 RIAA 653 (1930); *Chase Case* (1846) Moore Int Arb 3336. Nor is it sufficient that the culprit is convicted of an offence other than that committed against the alien: *Connolly Case* 4 RIAA 387 (1928). However, the state is not responsible solely because the culprit is prosecuted and properly found not guilty: *Willis Case* 4 RIAA 544 (1929); *Gordon Case* 4 RIAA 586 (1930).

4 The state may be liable for inadequate punishment of the culprit (*Kennedy Case* 4 RIAA 194 (1927); *Morton Case* 4 RIAA 428 (1929); *Sewell Case* 4 RIAA 626 (1930); *Gust Adams Case* 6 RIAA 321 (1933)) or if it fails to give effect to a sentence awarded (*Mallén Case* 4 RIAA 173 (1927)). However, commutation of a death sentence has been held not to engage state responsibility: *Putnam Case* 4 RIAA 151 (1927); *Sewell Case* 4 RIAA 626 (1930). Reversal of the sentence of a court-martial on proper grounds has been held not to render the state liable: *García and Garza Case* 4 RIAA 119 (1926). An amnesty to a common criminal may give rise to responsibility: *West Case* 4 RIAA 270 (1927); *Denham Case* 6 RIAA 312 (1933). However, a general amnesty may not do so where the amnesty is concerned with the pacification of a country. For the distinction in such cases between crimes of a political nature and common crimes see the *Buena Tierra Mining Co Ltd Case* 5 RIAA 247 (1931); *Pringle (Santa Isabel) Case* 4 RIAA 783 (1926).

5 As to aliens in English law see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

6 *Janes Case* 4 RIAA 82 (1926).

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#### **470. Equality of aliens and nationals.**

In some respects, international law requires only that a state should accord the same treatment to aliens<sup>1</sup> as it does to its own nationals<sup>2</sup>. Thus, a state has the right to require that an alien should pay taxes and local rates<sup>3</sup>, undertake jury service if it is asked of him<sup>4</sup>, be subject to billeting of troops and to belligerent military requisitions in time of national emergency<sup>5</sup>, and serve in the police and the militia<sup>6</sup>. It appears, however, that an alien cannot be compelled to serve in the armed forces<sup>7</sup>, unless he is admitted into the state with a view to permanent residence or eventual naturalisation<sup>8</sup>.

1 See PARA 462 et seq. As to aliens in English law see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

2 By the European Convention on Establishment (Paris, 13 December 1955; TS 1 (1971); Cmnd 4573), the member states of the Council of Europe guaranteed common treatment of the nationals of each of them with respect to admission and expulsion and with regard to the enjoyment of civil rights, protection of property, social security benefits and taxation and, subject to certain exceptions, the same economic rights as those enjoyed by nationals. Similar benefits are guaranteed as between themselves by the member states of the European Union under the Treaty on the Functioning of the European Union (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179). The Treaty was formerly known as the Treaty Establishing the European Community; it has been renamed and its provisions renumbered: see PARA 304 note 1.

3 *Cook Case* 4 RIAA 593 at 595 (1930). The right to tax may be modified by rules of international law regarding confiscation of property: see PARA 473. The mere fact that a person is an alien is irrelevant to his tax liability under United Kingdom law: see generally **INCOME TAXATION**. The United Kingdom has entered into several agreements with other states for the avoidance of double taxation.

4 Report of the Law Officers of the Crown, 12 May 1873, 6 British Digest 367.

5 See 6 British Digest 398-401. As to taxation for military purposes see 6 British Digest 402-405.

6 See the Reports of the Law Officers of the Crown, 6 British Digest 368-372.

7 *Polites v The Commonwealth* (1945) 70 CLR 60 at 70, Aust HC, per Latham CJ. The court, however, held that it was bound to apply an Australian statute which imposed such liability upon aliens. See 6 British Digest 372-394. See also Brownlie *Principles of Public International Law* (7th Edn, 2008) p 521. During the 1939-45 War alien nationals of allied powers were conscripted into HM armed forces under the Allied Powers (War Service) Act 1942 (repealed), although this was done with the consent of the allied powers themselves. As to national service see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 27.

Great Britain has in the past entered into treaties with other states containing stipulations for reciprocal exemption of nationals from military service obligations: 6 British Digest 394-398. See the International Protocol relating to Military Obligations in Certain Cases of Double Nationality (The Hague, 12 April 1930; TS 22 (1937); Cmd 5460) amended by Protocol (Strasbourg 24 November 1977; TS 108 (1979); Cmnd 7756) and the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (Strasbourg, 6 May 1963; TS 88 (1971); Cmnd 4802) Chs II, III and IV. Chapter II deals with military obligations.

8 For example, the law of the United States of America requires that an alien who is admitted for permanent residence may be obliged to serve in the armed forces of the state (see the Universal Military Training Service Act 1951 (United States)), and that an alien who claims exemption from military service is thereafter permanently ineligible for citizenship (see Immigration and Nationality Act 1952 (United States)). The United Kingdom government has stated that it cannot object to the requirement of military service thus imposed upon immigrant British subjects into the United States in the absence of discrimination upon the basis of their nationality: 725 HC Official Report (5th series), 28 February 1966, col 899.

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#### **471. Treatment of aliens less favourable than national treatment.**

As a matter of customary international law a state may impose restrictions upon the exercise of certain rights by aliens<sup>1</sup> whom it has admitted into its territory<sup>2</sup>. Thus, it may impose restrictions upon the participation by aliens in political or public life<sup>3</sup>, ownership of property by aliens<sup>4</sup> or upon their taking employment<sup>5</sup>.

1 See PARA 462 et seq. As to aliens in English law see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

2 For the practice of the United Kingdom in this respect generally see 6 British Digest 254-269. As to territory see PARA 111 et seq.

3 An alien may be denied the right to vote or membership in the legislature. Under the law of the United Kingdom an alien cannot vote in a parliamentary election (see the Representation of the People Act 1983 s 1(1) (substituted by the Representation of the People Act 2000 s 1(1))) or sit in the House of Commons (Act of Settlement 1700 s 3 (modified by the Electoral Administration Act 2006 s 18)): see **ELECTIONS AND REFERENDUMS** vol 15(3) (2007 Reissue) PARAS 110, 231). Nationals of member states of the European Union may vote in elections to local government authorities in the United Kingdom: see the Representation of the People Act 1983 s 2(1) (substituted by the Representation of the People Act 2000 s 1(1)). Nationals of member states of the European Union may also vote in the United Kingdom in the elections for the Parliament of the European Union: European Parliamentary Elections Act 2002 s 8(5)); and see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 118.

4 If, however, an alien is permitted to own property, he may only be deprived of it in accordance with the rules of international law governing the expropriation of alien property: see PARA 473.

5 Under the law of the United Kingdom an alien may not hold any office of profit under the Crown (see the Act of Settlement 1700 s 3), but he may hold civil employment if this is outside the United Kingdom, or if a responsible minister certifies that a suitably qualified British subject is not available for the post in question or that the alien has exceptional qualifications: see the Aliens' Employment Act 1955 s 1 (amended by SI 1991/1221; SI 2007/617). Note that nothing in the Act of Settlement s 3 invalidates (1) any appointment, whether made before or after the passing of the Courts Act 2003 (ie 20 November 2003), of a justice of the peace; or (2) any act done by virtue of such an appointment: s 42.

Certain persons with alien parents may be refused employment under the Crown: see the Aliens' Restriction (Amendment) Act 1919 s 6; the Aliens' Employment Act 1955 s 1; and see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

An alien may not be a member of the regular forces or any of Her Majesty's forces raised under the law of a British overseas territory, but regulations may be made so as to provide for this restriction not to apply to an alien who satisfies prescribed conditions: see the Armed Forces Act 2006 s 340. In exercise of this power, the Armed Forces (Aliens) Regulations 2009, SI 2009/835, have been made which specify that the restriction in the Armed Forces Act 2006 s 340(1) does not apply to a citizen or national of Nepal who serves, or has for not less than five years served, in the Brigade of Gurkhas: see **ARMED FORCES**.

As to discrimination on the basis of nationality see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 441.

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#### 472. Expulsion of aliens.

As a matter of customary international law, a state may expel an alien<sup>1</sup> from its territory<sup>2</sup> at its discretion<sup>3</sup>. However, this discretion is not absolute: a state must not abuse its right by acting arbitrarily in taking a decision to expel an alien, and an international tribunal may require reasons to be given for the expulsion of an alien and may pronounce upon their adequacy<sup>4</sup>. The manner of expulsion may engage the international responsibility of the expelling state to that of the alien's nationality. In particular, the expulsion should be consistent with the domestic law of the expelling state<sup>5</sup> and be carried out with the minimum of inconvenience and indignity to the alien<sup>6</sup>. The right to expel aliens may be limited by treaty<sup>7</sup>. An alien should not be deported except to the country of which he is a national<sup>8</sup>.

1 See PARA 462 et seq. As to aliens in English law see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

2 As to territory see PARA 111 et seq.

3 See 1 Oppenheim's International Law (9th Edn) 940-945. The general right to expel aliens was recognised in the *Boffolo Case* 10 RIAA 528 at 537 (1903). See also *A-G for Canada v Cain* [1906] AC 542 at 546, PC. The right to expel aliens is recognised by the United Kingdom government: see 460 HC Official Report (5th series), 19 January 1949, cols 154-155; 682 HC Official Report (5th series), 1 August 1963, written answers, col 164; 725 HC Official Report (5th series), 8 March 1966, col 1880. As to the present law of the United Kingdom on the deportation of non-British citizens see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 160. As to extradition generally see **EXTRADITION**. There are limitations on deportation and extradition: see eg *Soering v United Kingdom* (1989) 11 EHRR 439, ECtHR; *Chahal v United Kingdom* (1996) 23 EHRR 413, ECtHR (extradition or deportation might result in individual suffering inhuman or degrading treatment contrary to art 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (commonly referred to as the 'European Convention on Human Rights')); and *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [2004] 3 All ER 785 (successful reliance on articles other than art 3 of the European Convention on Human Rights as a ground for resisting extradition or expulsion demand the presentation of a very strong case). The expulsion of persons who, by long residence, have acquired prima facie the effective nationality of the host state is not a matter of discretion, since the issue of nationality places the right to expel in question: see Brownlie *Principles of Public International Law* (7th Edn, 2008) p 521.

4 See 1 Oppenheim's International Law (9th Edn) 940-945. See also *Boffolo Case* 10 RIAA 528 (1903); *Chase Case* (1846) Moore Int Arb 3336; *Costa's Case* (1868) Moore Int Arb 3724. An alien may be 'constructively' expelled, ie although no law, regulation or directive forces him to leave, his continued presence in the state is made impossible because of conditions brought about by wrongful acts of the state: *Rankin v Islamic Republic of Iran* 17 Iran-US CTR 135 (1987); *Yeager v Islamic Republic of Iran* 17 Iran-US CTR 92 (1987); *International Technical Products and ITP Export Corp v Islamic Republic of Iran* 9 Iran-US CTR 18 (1986). See *Short v Islamic Republic of Iran* 16 Iran-US CTR 76 (1987).

5 *Boffolo Case* 10 RIAA 528 (1903) (where it was also held that in time of peace an alien should only be expelled in the interests of public order or for reasons of state security). See also the International Covenant on Civil and Political Rights 1966, 16 December 1966 (UN TS vol 999, p 171) art 13. It appears that in time of war a state has the right to expel all enemy aliens from its territory: see 1 Oppenheim's International Law (9th Edn) 941. Under the Convention relative to the Protection of Civilian Persons in Time of War (Geneva Red Cross Convention) (Geneva, 12 August 1949; TS 39 (1958); Cmd 550), the right of civilians to depart from the territory of an enemy state on the outbreak of war is stipulated for in art 35 (set out in the Geneva Conventions Act 1957 Sch 4: see **WAR AND ARMED CONFLICT**). As to the meaning of 'state' see PARA 39 et seq.

6 The state must act reasonably in the manner in which it effects an expulsion: see 1 Oppenheim's International Law (9th Edn) 940, 945-948. See also *Maal Case* 10 RIAA 730 (1903); *Ben Tillett's Case* (1898) 6 British Digest 124 at 147; *Attellis Case* (1839) Moore Int Arb 3333; *Dillon Case* 4 RIAA 368 (1928). See British Practice in International Law 1966, 111-115.

7 See eg the European Convention on Establishment (Paris, 13 December 1955; TS 1 (1971); Cmnd 4573); Treaty on the Functioning of the European Union (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) arts 49-55 (formerly arts 52-58 of the Treaty Establishing the European Economic Community, which was renamed and renumbered by the Treaty of Lisbon Amending the Treaty Establishing the European Union and the Treaty Establishing the European Community (Lisbon, 13 December 2007, ECS 13 (2007); Cm 7294)). See also the International Covenant on Civil and Political Rights 1966 art 13, and the limitations imposed by virtue of the European Convention of Human Rights (eg the right not to be subjected to torture or to inhuman or degrading treatment or punishment: see art 3; and note 3). As to the meaning of 'treaty' see PARA 71.

8 Reply of the United Kingdom Government to League of Nations Questionnaire for the Hague Codification Conference 1930; League of Nations Official Journal (1934) 373. It is not the practice to deport stateless aliens from the United Kingdom.

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#### 473. Expropriation of aliens' property.

It is now generally accepted that, subject to any international engagements to the contrary<sup>1</sup>, expropriation<sup>2</sup> of the property of aliens<sup>3</sup> is not in itself contrary to international law, provided that certain conditions are met<sup>4</sup>. The debate has focused on the nature of these conditions. It is now generally considered that expropriation will not be contrary to international law<sup>5</sup>, provided: (1) it is for some bona fide public purpose<sup>6</sup>; (2) it is not discriminatory<sup>7</sup>; and (3) it is accompanied by compensation<sup>8</sup>.

1 As to bilateral investment treaties see PARAS 481-487. The engagement could also be contained in a contract with the state that is governed by international law.

2 As to the nature of expropriation see PARA 474.

3 See PARA 462 et seq. As to aliens in English law see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

4 See 1 Oppenheim's International Law (9th Edn) pp 918-922 (the expropriation must not be arbitrary); Shaw's International Law (6th Edn, 2008) pp 828-829. See also General Assembly Resolution 1803 (XVII) of 14 December 1962 concerning Permanent Sovereignty over Natural Resources art 4; Resolution 2158 (XXI) of 25 November 1966; Draft OECD Convention on Protection of Foreign Investment 1967 (the Draft Convention can be found in 7 ILM (1968) 241, 248); Harvard Draft Convention on International Responsibility of States for Injuries to Aliens 1961 art 10 (the Draft Convention can be found in 55 American Journal of International Law 553). See also American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States (1987) para 712; *Taking of Property*, UNCTAD Series on issues in international investment agreements (2000) pp 11-17 (also referring to a requirement of due process); and *International Investment Agreements: Key Issues Vol I*, UNCTAD Series on issues in international investment agreements (2004) p 235. See also *International Investment Law: A Changing Landscape*, OECD (2005) pp 45-48. In *Methanex Corp v United States* 44 ILM (2005) 1343 a tribunal constituted under Ch 11 of the North Atlantic Free Trade Agreement ('NAFTA') found that as a matter of general international law, a non-discriminatory regulation for a public purpose which is enacted in accordance with due process and which affects a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation. However, see the controversial approach adopted in General Assembly Resolution 3281 (XXIX) 12 December 1974 (Charter of Economic Rights and Duties of States) art 2.

5 Differing types of expropriation have been distinguished as follows: (1) expropriation for certain public purposes (eg exercise of police power and defence measures in wartime is lawful even if no compensation is payable); (2) expropriation of particular items of property is unlawful unless there is payment of effective compensation; (3) nationalisation, (ie expropriation of a major industry or resource) is unlawful only if there is no provision for compensation payable on a basis compatible with the economic objectives of the nationalisation and the viability of the economy as a whole: see Brownlie *Principles of Public International Law* (7th Edn, 2008) p 538.

6 As to public purpose see PARA 475.

7 As to discrimination see PARA 476.

8 As to compensation see PARA 478.

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#### **474. The nature of expropriatory conduct.**

At its most straightforward expropriation consists of an outright deprivation of the owner's title to property, but expropriation may take many forms and action that falls short of a direct taking of the assets in question by the state may still constitute expropriation<sup>1</sup>. For example expropriation may be constituted by depriving the owner of the use of property<sup>2</sup>, or excessive use of national legislation to deprive the owner of the fruits of his property (as in the use of tax or exchange laws<sup>3</sup>), or by a government taking successive measures which result in the foreign company being rendered incapable of managing its property<sup>4</sup>. One relevant factor will be whether the acts of the given state are in conflict with undertakings and assurances given in good faith to aliens as an inducement to their making the investments affected by the action<sup>5</sup>. While there has been limited analysis as to the types of property that may be subject to expropriation as a matter of customary international law, it is now well established that property is not confined to immoveable or tangible assets or assets such as shares, but also extends to rights under a contract<sup>6</sup>.

1 See 1 Oppenheim's International Law (9th Edn) pp 916-918; Shaw's International Law (6th Edn, 2008) pp 830-832; OECD's International Investment Law, A Changing Landscape (2005) pp 45-48. See generally Judge Higgins 'The Taking of Property by the State: Recent Developments in International Law' *Recueil des Cours* (1982), vol 176, issue III.

2 See the Harvard Draft Convention on International Responsibility of States for Injuries to Aliens 1961 art 3 (55 American Journal of International Law 548); cited in *Pope & Talbot v Government of Canada* 122 Int LR 293 at 336; Whiteman's Damages in International Law 1387. See also the Note of the United Kingdom government to that of Indonesia respecting British owned Commercial Properties, *British Practice in International Law* 1964, 194, 195.

3 As to use of tax laws see 704 HC Official Report (5th series), 22 December 1964, col 1036 (Burma company taxation); as to exchange laws see 262 HL Official Report (5th series), 9 December 1964, cols 91-92.

4 See *Starrett Housing Corp v Islamic Republic of Iran* 4 Iran-US CTR 122 (1983), 154, where the tribunal found that it is recognised in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property remains with the original owner. See also *Tippetts v TAMS-AFFA Consulting Engineers of Iran*, Award of 22 June 1984, 6 Iran-US CTR 219 at 225. However, see the *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15; *Sedco Inc v National Iranian Oil Co* 10 Iran-US CTR 180 (1986).

5 See *Revere Copper & Brass v OPIC* (1978) 56 Int LR 257 at 271.

6 See *Libyan American Oil Co (LIAMCO) v Government of the Libyan Arab Republic* (1977) 62 Int LR 140 at 189. See also the Harvard Draft Convention on International Responsibility of States for Injuries to Aliens 1961 art 10(7) (55 American Journal of International Law 548); Judge Higgins 'The Taking of Property by the State: Recent Developments in International Law' *Recueil des Cours* (1982), vol 176, issue III. As to expropriation of concessionary contracts see eg *Rudloff Case* 9 RIAA 244 at 250 (1903); *Saudi-Arabia v Arabian American Oil Co (Aramco) Arbitration* (1958) 27 Int LR 117 at 204; *Arbitration between Valentine Petroleum and Chemical Corp and Agency for International Development* (1967) 44 Int LR 79 at 87; *Starrett Housing Corp v Islamic Republic of Iran* 4 Iran-US CTR 122 (1983); *Amoco International Finance Corp v Islamic Republic of Iran* 15 Iran-US CTR 189 (1987).

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#### **475. Public purpose.**

The expropriation<sup>1</sup> must be motivated in good faith by some social or economic public purpose involving the use of the property which is expropriated<sup>2</sup>. Taking property for the purpose of exerting pressure in a political dispute<sup>3</sup>, or in order to hand it over to another individual or company would therefore be unlawful<sup>4</sup>.

<sup>1</sup> See PARA 473 et seq.

<sup>2</sup> *Certain German Interests in Polish Upper Silesia* PCIJ Ser A No 7 at 22 (1926); *Norwegian Shipowners Case* 1 RIAA 307 (1922). See also Shaw's International Law (6th Edn, 2008) pp 833-834. As to cases involving an environmental context see *Compañía Del Desarrollo de Santa Elena SA v Republic of Costa Rica* ICSID Case No ARB/96/1, 39 ILM (2000) 1317; and *Methanex Corp v United States* 44 ILM (2005) 1343, 1456 para 7 (part IV/D of the award). As to the peaceful enjoyment of possessions see the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1952; TS 46 (1954); Cmd 9221) art 1; and see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 165. For cases where tribunals have accepted a clear case of a genuine public need see *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 665, 679, 680 (1925); *Portuguese Religious Properties Case* 1 RIAA 7 (1920); *Application 511/59, Gudmundsson v Iceland* 3 Yearbook HR 394 at 422; *Amoco International Finance Corp v Islamic Republic of Iran* 15 Iran-US CTR 189 (1987).

<sup>3</sup> For the position of the Netherlands regarding Indonesian expropriation of Dutch properties see 8 Whiteman's Digest 1048-1053. For Indonesian measures against British properties see British Practice in International Law 1964, 194-200. The Cuban nationalisations of American property in 1960 were for avowedly political purposes: see 8 Whiteman's Digest 1042-1047. The Cuban decrees were disregarded as being not for a public purpose and as discriminatory and confiscatory in *Banco Nacional de Cuba v Sabbatino* 307 F 2d 845 (USA Cir 1962); revsd by the Supreme Court by reliance on the 'act of state' doctrine 376 US 398 (1964); re-aff'd by the Court of Appeals, after an amendment to the Foreign Assistance Act 1961 (United States) in relation to the discriminatory and political nature of the decrees, sub nom *Banco Nacional de Cuba v Farr* 272 F Supp 836 (USA 1965). As to acts of state see PARA 22 et seq.

In 1971 Libya seized the property of British Petroleum Ltd for an avowedly political purpose, and the United Kingdom government protested on 23 December 1971. The dispute was settled by agreement between the company and Libya in December 1974. For the award of the arbitrator in that case see *BP Exploration Co (Libya) Ltd v Government of the Libyan Arab Republic* (1973) 53 Int LR 297 (damages awarded). See also *Texaco Overseas Petroleum Co and California Asiatic Oil Co v Government of the Libyan Arab Republic* (1977) 53 Int LR 389; *Libyan American Oil Co (LIAMCO) v Government of the Libyan Arab Republic* (1977) 62 Int LR 140 at 194 (stating that the public utility principle is not a necessary requisite for the legality of a nationalisation, although it was relevant to the question of whether there had been discrimination).

<sup>4</sup> *Walter Fletcher Smith* 2 RIAA 913 (1929).



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#### **476. Discrimination.**

The expropriation<sup>1</sup> of alien<sup>2</sup> property must not be such as to discriminate against the property or its owners<sup>3</sup>.

<sup>1</sup> See PARA 473 et seq.

<sup>2</sup> See PARA 462 et seq. As to aliens in English law see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

<sup>3</sup> *Norwegian Shipowners Case* 1 RIAA 307 at 339 (1922); *British Claims in the Spanish Zone of Morocco* 2 RIAA 615 at 647 (1925); *Standard Oil Co Case* 2 RIAA 781 (1926). See the Indonesian, Cuban and Libyan nationalisations referred to in PARA 475 note 3. In arbitrations which arose out of Libyan nationalisations between British and American oil companies, the principle of non-discrimination was confirmed. In *BP Exploration Co (Libya) Ltd v Government of the Libyan Arab Republic* (1973) 53 Int LR 297 and *Libyan American Oil Co (LIAMCO) v Government of the Libyan Arab Republic* (1977) 62 Int LR 140, the Libyan measures were held to be discriminatory. In *Texaco Overseas Petroleum Co and California Asiatic Oil Co v Government of the Libyan Arab Republic* (1977) 53 Int LR 389, the measures in question were held to be non-discriminatory. The Iran-US Claims Tribunal held that certain Iranian measures were non-discriminatory in *Amoco International Finance Corp v Islamic Republic of Iran* 15 Iran-US CTR 189 (1987). See also *Kuwait v American Independent Oil Co* (1982) 66 ILR 519, 584. The absence of discrimination is only one factor which may render an expropriation lawful; eg a measure prohibited by an international agreement cannot become lawful simply because it is applied by the state also to its own nationals: *Certain German Interests in Polish Upper Silesia* PCIJ Ser A No 7 at 32 (1926); *Peter Pázmány University Case* PCIJ Ser A/B No 61 at 39 (1933).

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**477. Treaty obligations.**

Expropriation<sup>1</sup> contrary to a treaty<sup>2</sup> obligation engages state responsibility<sup>3</sup>.

1 See PARA 473 et seq.

2 As to the meaning of 'treaty' see PARA 71.

3 Most expropriation claims are now brought pursuant to the provisions in bilateral investment treaties (as to which see PARAS 481-487). See also *Factory at Chorzów* PCIJ Ser A No 17 at 46 (1928). General Assembly Resolution 1803 (XVII) 14 December 1962 provides that foreign investment agreements entered into by or between states must be observed in good faith.

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#### **478. Compensation.**

Even if an expropriation<sup>1</sup> fulfils the conditions of public purpose<sup>2</sup> and non-discrimination<sup>3</sup>, it is still unlawful if there is a failure to provide for compensation<sup>4</sup>. One formula commonly used is that the compensation must be prompt, adequate and effective<sup>5</sup>, although according to a different school of thought the applicable standard is one of 'appropriate compensation'<sup>6</sup>. A claimant may, in any event, agree to accept less than full compensation<sup>7</sup>.

1 See PARA 473 et seq.

2 See PARA 475.

3 See PARA 476.

4 The general entitlement to compensation has been a subject of controversy but is now largely accepted, although there may be exceptions, eg where expropriation follows from a legitimate exercise of police power: see Brownlie's *Principles of Public International Law* (7th Edn, 2008) pp 533-536. See also generally Ripinsky and Williams *Damages in International Investment Law* (1st Edn, 2008).

5 This is the so-called Hull formula: see the note of Secretary of State Cordell Hull to the Government of Mexico dated 21 July 1938, 3 Hackworth's Digest 662. This is reflected in the wording of many bilateral investment treaties. See also *Santa Elena v Costa Rica* 39 ILM 1317 at para 71, and the *Norwegian Shipowners Case* 1 RIAA 307 at 338, 340 (1922) referring to the right of the claimants to receive immediate and full compensation. According to the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') art 31(1), Report of the International Law Commission, 53rd Session (2001), YILC 2001, vol II(2) (see PARA 374), the general obligation on a responsible state is to make full reparation for the injury caused by the internationally wrongful act. See also art 35 and the Commentary thereto (see PARA 375) dealing with the obligation to pay compensation.

6 See General Assembly Resolution 1803 (XVII) 14 December 1962, which requires that in taking property on grounds of public utility, the owner must be paid appropriate compensation in accordance with the rules in force in the state taking such measures, and in accordance with international law. See also General Assembly Resolution 3281 (XXIX) 12 December 1974 (Charter of Economic Rights and Duties of States) art 2(c), which provides only that the state taking property should pay appropriate compensation taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. The United Kingdom voted against the adoption of art 2.

In *Texaco Overseas Petroleum Co and California Asiatic Oil Co v Government of the Libyan Arab Republic* (1977) 53 Int LR 389, the arbitrator held that because the capital exporting states had voted against or had abstained from voting upon art 2 (and in some cases General Assembly Resolution 3281 (XXIX) as a whole) that article did not represent customary international law. Some tribunals have applied the 'appropriate compensation' principle contained in General Assembly Resolution 1803 (XVII): *Kuwait v American Independent Oil Co* 21 ILM (1982) 976. The Iran-US Claims Tribunal also applied the 'appropriate compensation' principle in several cases: see eg *Amoco International Finance Corp v Islamic Republic of Iran* 15 Iran-US CTR 189 (1987).

It is to be noted that the World Bank Guidelines on the Treatment of Foreign Direct Investment 31 ILM (1992) 1366, 1382 equate appropriate compensation with compensation that is adequate, effective and prompt.

7 This has occurred in the case of several post-war global settlements between the United States government and those of foreign states.

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### **(3) INVESTMENT PROTECTION AND DISPUTE SETTLEMENT**

#### **479. Differing sources of investment protection.**

A foreign investor investing in another state may benefit from specific protections in the form of legislation protecting foreign investments in the host state, protections established by bilateral or multilateral investment treaties<sup>1</sup>, or protections established by the terms of a given concession or investment contract with the host state or a state entity. The foreign investor investing in another state benefits from certain protections established as a matter of customary international law<sup>2</sup>, but these may be of limited benefit unless the foreign investor has a forum before which international claims can be brought<sup>3</sup>.

1 As to the most important substantive protections commonly established by bilateral or multilateral investment treaties see PARAS 481-487.

2 See PARA 480. As to substantive protections of particular importance to investors that are established by customary international law see PARAS 463 et seq, 473-478.

3 The foreign investor may be of the view that he will not be accorded an impartial hearing in the courts of the host state. As to the difficulties that may be encountered in establishing an inter-state claim based on the exercise of diplomatic protection by the state of the investor see PARAS 386-387. Investment claims brought on the basis of diplomatic protection are now very rare.

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**480. Substantive protections accorded to foreign investors as a matter of customary international law.**

As a matter of customary international law, the investment of a foreign investor will be protected by application of the international minimum standard<sup>1</sup> and the prohibition of expropriation by the host state save where this is (1) for some bona fide public purpose; (2) not discriminatory; and (3) accompanied by compensation<sup>2</sup>.

1 See PARA 463.

2 See PARAS 473-478.

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#### **481. Substantive protections accorded to foreign investors as a matter of treaty law.**

The United Kingdom is party to various bilateral investment treaties (which are termed Investment Promotion and Protection Agreements or 'IPPA's')<sup>1</sup>. There are also multilateral treaties in force that contain important investment protections<sup>2</sup>. Bilateral investment treaties typically contain guarantees that the state will accord to qualifying investors and/or their investments<sup>3</sup> full protection and security<sup>4</sup>, fair and equitable treatment<sup>5</sup>, national<sup>6</sup> and most favoured nation treatment<sup>7</sup>, and typically contain a prohibition of expropriation<sup>8</sup> (unless in compliance with certain stated criteria), and a guarantee of the free transfer in relation to returns and the capital of the investment<sup>9</sup>. Bilateral investment treaties are important to investors not just for the substantive protections they contain but also because they commonly (but not invariably) contain an offer to refer disputes with investors to international arbitration and thus provide an impartial forum for the settlement of disputes<sup>10</sup>.

It has also been said that, by virtue of the very large number of bilateral investment treaties concluded, the substantive protections in such treaties impact on the content of customary international law<sup>11</sup>. There is no system of binding precedent either as a matter of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention')<sup>12</sup> or so far as concerns other investment treaty arbitrations. It follows that different treaty tribunals may interpret substantively similar treaty provisions to different effect. This happens not infrequently in practice, and the law is currently unsettled regarding many of the provisions typically found in bilateral investment treaties<sup>13</sup>. However, the precise wording of the substantive protections varies from treaty to treaty, and it will be for each given arbitral tribunal to interpret the wording before it<sup>14</sup>.

1 See eg the Agreement between the United Kingdom of Great Britain and Northern Ireland and Bosnia and Herzegovina for the Promotion and Protection of Investments (Blackpool, 2 October 2002; TS 37 (2003); Cm 5973). The text of all the UK IPPAs is available on the Foreign Office website (see [www.fco.gov.uk](http://www.fco.gov.uk)). Other bilateral investment treaties are available on the United Nations Conference on Trade and Development website (see [www.unctad.org](http://www.unctad.org)). See also Dolzer and Schreuer *Principles of International Investment Law* (1st Edn, 2008) p 17. As to damages in investment treaty claims see generally Ripinsky and Williams *Damages in International Investment Law* (1st Edn, 2008).

2 See eg the Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (Lisbon, 17 December 1994; TS 78 (2000); Cm 4761) (to which the United Kingdom is a party along with all other EU states and various other states). The United Kingdom instrument of ratification was deposited on 16 December 1997 and the Treaty and Protocol entered into force for the United Kingdom on 16 April 1998. See also the North Atlantic Free Trade Agreement ('NAFTA') to which Canada, Mexico and the United States of America are parties.

3 Bilateral investment treaties invariably contain definitions for qualifying investors and investments that will have to be met in each case. In part for this reason, jurisdictional objections are very common in bilateral investment treaty cases. For a consideration of the principles and jurisprudence relevant to jurisdictional issues see eg Dolzer and Schreuer *Principles of International Investment Law* (1st Edn, 2008) pp 46-65; Douglas *The International Law of Investment Claims* (1st Edn, 2009); McLachlan, Shore and Weiniger *International Investment Arbitration* (1st Edn, 2007) Chs 4-6.

4 See PARA 482.

5 See PARA 483. As is fairly common in bilateral treaties, UK IPPAs (including the latest UK model IPPA) contain a provision by which each state agrees to observe any obligation it may have entered into with regard

to investments of nationals or companies of the other state (a so-called 'umbrella clause'): see PARA 483 text and note 6.

6 See PARA 484.

7 See PARA 485.

8 See PARA 486.

9 See PARA 487.

10 As to jurisdictional objections see note 3. As to the different nature of the direct right of action by the investor against the state, as compared to the exercise of a right of diplomatic protection by the state of the investor, see Douglas 'The Hybrid Foundations of Investment Treaty Arbitration' [2003] BYIL 151 cited in *Republic of Ecuador v Occidental Petroleum and Production Co* [2005] EWCA Civ 1116, [2006] QB 432, [2006] 2 All ER 225. In that case the court held, in the context of the justiciability of a challenge under the Arbitration Act 1996 to the award of a treaty tribunal, that the bilateral investment treaty involved a deliberate attempt to ensure for private investors the benefits and protection of consensual arbitration, which was an aim to which national courts should aspire to give effect. The court also concluded (obiter) that the arbitration agreement created when the investor accepted the offer to arbitrate would itself be governed by international law. This finding has been applied in *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, [2009] 2 All ER (Comm) 37, [2009] 1 WLR 665; and *Sancheti v City of London* [2008] EWCA Civ 1283, [2009] 1 Lloyd's Rep 117, [2008] All ER (D) 204 (Nov). It has always been central to the position of the United Kingdom, and indeed of other states, in the business of concluding IPPAs that an agreement without effective provisions for the settlement of disputes between an investor and the host state is not worth having: see Denza and Brooks 'Investment Protections Treaties: United Kingdom Experience' 36 ICLQ 908 at 923.

11 See eg *Mondev International Ltd v United States of America* ICSID Case No ARB (AF)/99/2, Award of 11 October 2002, 42 ILM 85, 6 ICSID Rep 192 (2004).

12 See eg *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Republic of Pakistan* ICSID Case No ARB/03/29, Award of 27 August 2009 at para 145. However, tribunals will pay regard to previous decisions and will follow these if they find the reasoning persuasive. As to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; Cmnd 3255) see PARA 488 note 1.

13 Eg as to the fair and equitable treatment standard and most favoured nation treatment: see PARAS 483, 485.

14 In accordance with arts 31, 32 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964): see PARAS 95-97.

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#### **482. Full protection and security.**

Bilateral investment treaties (including UK Investment Promotion and Protection Agreements or 'IPPA's<sup>1</sup>) commonly provide that investors are at all times to enjoy full protection and security in the territory of the host state<sup>2</sup>. This has generally been interpreted as protecting the investor against failures by the state to protect the physical integrity of the investor's property, either in relation to damage caused by state officials or by the actions of others where the state has failed to exercise due diligence<sup>3</sup>. The standard has on occasion been interpreted as going beyond physical security to regulatory security, and some bilateral investment treaties contain wording that suggests that both physical and other forms of security are intended to be provided<sup>4</sup>. In such cases the provision may overlap to some degree with the fair and equitable treatment standard<sup>5</sup>.

1 See PARA 481 note 1.

2 This is the formulation commonly used in UK IPPAs and other bilateral investment treaties, but the precise wording varies and this may impact on the correct interpretation of the provision. The provision has its origins in bilateral treaties of friendship, commerce and navigation (FCN treaties) and customary international law. See generally McLachlan, Shore and Weiniger *International Investment Arbitration* (1st Edn, 2007) pp 247-250, Reinisch (ed) *Standards of Investment Protection* (1st Edn, 2008) pp 131-150.

3 See *Asian Agricultural Products Ltd (AAPL) v Sri Lanka* ICSID Case No ARB/87/3, Award of 27 June 1990, 30 ILM (1991) 577, 4 ICSID Rep 245 (1997); *Noble Ventures Inc v Romania* ICSID Case No ARB/01/11, Award of 12 October 2005, at para 164.

4 See eg the treaty under consideration in *Siemens AG v Argentine Republic* ICSID Case No ARB/02/8, Award of 6 February 2007, which made express reference to legal security. For a broader interpretation of the full protection and security standard see *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* ICSID Case No ARB/97/3, Award of 20 August 2007.

5 See PARA 483.



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### 483. The fair and equitable treatment standard.

Most bilateral investment treaties (including UK Investment Promotion and Protection Agreements or 'IPPA's<sup>1</sup>) provide that investors must at all times be accorded fair and equitable treatment in the territory of the host state<sup>2</sup>. There is considerable uncertainty as to the precise content of the fair and equitable treatment standard and there is an ongoing debate as to whether the standard accords to investors any protection beyond the minimum standard applicable as a matter of customary international law<sup>3</sup>. It has been held that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the state and is harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety (as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process)<sup>4</sup>. A simple breach of contract by the state is not generally considered to amount to a breach of the fair and equitable treatment standard, although the position is likely to be different where the state commits the breach in exercise of its sovereign power<sup>5</sup>. Certain bilateral investment treaties, including many UK IPPAs, contain a provision by which each state agrees to observe any obligation it may have entered into with regard to investments of nationals or companies of the other state (a so-called 'umbrella clause')<sup>6</sup>.

1 See PARA 481 note 1.

2 See generally McLachlan, Shore and Weiniger *International Investment Arbitration* (1st Edn, 2007) pp 226-247; Reinisch (ed) *Standards of Investment Protection* (1st Edn, 2008) pp 111-130. The precise wording of the standard may vary from treaty to treaty.

3 See eg the consideration of this topic in OECD, *International Investment Law: A Changing Landscape* (2005) Ch 3.

4 See *Waste Management Inc v United Mexican States* ICSID Case No ARB(AF)/00/3, Award of 30 April 2004, 43 ILM (2004) 967 para 98. This is in the context of a consideration of prior cases on fair and equitable treatment under art 1105 of the North Atlantic Free Trade Agreement ('NAFTA') (available at the date at which this volume states the law on the NAFTA Secretariat website at [www.nafta-sec-alena.org](http://www.nafta-sec-alena.org)), which has been authoritatively interpreted as confined to the international minimum standard. However, this is a frequently cited case outside the NAFTA context. The *Waste Management Inc v United Mexican States* award also states that in applying the standard it is relevant that the treatment is in breach of representations made by the host state which were reasonably relied on by the claimant. This is consistent with other cases in which considerable attention has been paid to the investor's legitimate or investment-backed expectations. For a consideration of the contents of the fair and equitable treatment standard in the context of the UK-Tanzania IPPA see *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22, Award of 24 July 2008 at paras 588-603.

As to the definition of arbitrariness see *Elettronica Sicula SPA (ELSI) (United States v Italy)* (1989) ICJ Reports 15, 76 (considered by the tribunal in *Mondev International Ltd v United States of America* ICSID Case No ARB (AF)/99/2, Award of 11 October 2002, 42 ILM 85, 6 ICSID Rep 192 (2004) at para 127).

As to protection from a denial of justice which is part of the fair and equitable treatment standard see PARAS 464-469. In deciding whether there has been a breach of the fair and equitable treatment standard, it may be relevant that the investor knew that there was a politically unstable climate in the host state at the time of investing: see eg *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Republic of Pakistan* ICSID Case No ARB/03/29, Award of 27 August 2009 at para 193. See also *S D Myers v Canada*, Partial Award of 14 November 2000, in a NAFTA arbitration under the UNCITRAL arbitration rules, at para 263, referring to the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.

5 See eg *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Republic of Pakistan* ICSID Case No ARB/03/29, Award of 27 August 2009 at para 180. The availability of an agreed forum for the resolution of a contractual dispute may also have an impact on the question of whether the standard has been breached: see *Waste Management Inc v United Mexican States* ICSID Case No ARB(AF)/00/3, Award of 30 April 2004, 43 ILM (2004) 967 at para 116.

6 The meaning and effect of the umbrella clause is far from settled. The precise wording of the umbrella clause may of course vary from treaty to treaty, and this may account for some of the differing interpretations in the jurisprudence. For a survey of the recent jurisprudence see Dolzer and Schreuer *Principles of International Investment Law* (1st Edn, 2008) pp 153-162. See also 'Interpretation of the Umbrella Clause in Investment Agreements' OECD Finance & Investment/Insurance & Pensions, Vol 2008 No 2 (March 2008) pp 106-141.

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#### **484. National treatment.**

Bilateral investment treaties (including UK Investment Promotion and Protection Agreements or 'IPPA's<sup>1</sup>) commonly provide that investors and investments must be accorded treatment no less favourable than that which is accorded to investors or investments of nationals of the host state<sup>2</sup>. This provision is generally seen as directed against measures that distinguish on the basis of nationality<sup>3</sup>. It appears that a claimant need not establish discriminatory intent; discriminatory effect will suffice<sup>4</sup>.

1 See PARA 481 note 1.

2 See generally McLachlan, Shore and Weiniger *International Investment Arbitration* (1st Edn, 2007) 251-254; Reinisch (ed) *Standards of Investment Protection* (1st Edn, 2008) pp 29-58. The precise wording of the standard varies from treaty to treaty.

3 See eg *Consortium RFCC v Morocco* ICSID Case No ARB/00/06, Award of 22 December 2003, 20 ICSID Rev FILJ 391 (2005) para 75; *Noble Ventures Inc v Romania* ICSID Case No ARB/01/11, Award of 12 October 2005 at para 180.

4 See eg *Feldman v United Mexican States* ICSID Case No ARB(AF)/99/01, Award of 16 December 2002, 42 ILM (2003) 625, 7 ICSID Rep 341 (2005) at paras 181-184. It is to be noted that many of the cases concerning national treatment have been brought by reference to art 1102 of the North Atlantic Free Trade Agreement ('NAFTA') (available at the date at which this volume states the law on the NAFTA Secretariat website at [www.nafta-sec-alena.org](http://www.nafta-sec-alena.org)) which contains an express requirement that the foreign investor/investment and the investor/investment of the host state be in 'like circumstances'.

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#### **485. Most favoured nation treatment.**

Bilateral investment treaties (including UK Investment Promotion and Protection Agreements or 'IPPA's<sup>1</sup>) commonly provide that investors and investments must be accorded treatment no less favourable than that which is accorded to investors or investments of any third state<sup>2</sup>. The precise wording of such provisions varies and may be critical to the scope and extent of the most favoured nation ('MFN') treatment<sup>3</sup>. It is generally considered that as one aspect of MFN treatment an investor will be entitled to benefit from any more favourable substantive protections offered by the host state to investors of other nationalities in other bilateral investment treaties<sup>4</sup>. There is considerable debate as to whether an investor is also entitled to use the MFN provision to benefit from more favourable dispute settlement provisions in another bilateral investment treaty, whether in respect of more favourable notice or negotiation periods or an actual offer to arbitrate<sup>5</sup>. The wording of the given treaty may make this express<sup>6</sup>.

1 See PARA 481 note 1.

2 See generally the OECD's International Investment Law, A Changing Landscape (2005) Ch 4. See also Reinisch (ed) *Standards of Investment Protection* (1st Edn, 2008) pp 59-86. The topic of MFN provisions is also under consideration by the International Law Commission.

3 See eg *RosInvest v Russian Federation* Award on Jurisdiction, October 2007, at paras 128-130 (concerning the UK-USSR IPPA of 6 April 1989: see the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments (London, 6 April 1989; TS 3 (1992); Cm 1791)). The scope of the provision in question was found to turn on the question of whether most favoured nation treatment was accorded to investors (in which case there would be entitlement to benefit from an arbitration offer in a different bilateral investment treaty) or whether it was accorded to investments (in which case there would be no such entitlement).

4 See eg *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Republic of Pakistan* ICSID Case No ARB/03/29, Award of 27 August 2009 at paras 157-160. It will nonetheless be necessary in each case to ascertain the intentions of the treaty parties as this appears from the MFN provision, particularly when a contrary intention may also appear from the omissions of a given substantive provision from the treaty in question. In addition, the question of whether a given substantive protection in another treaty is ejusdem generis is one that will have to be answered in every case: see Arbitration Award No 24/2007 *Renta 4 SVSA et al v Russian Federation*, 20 March 2009, SCC, and the jurisprudence of the International Court of Justice considered there. It should also be noted that bilateral investment treaties (including UK IPPAs) frequently contain express exceptions to most favoured nation treatment, eg in respect of a preference or privilege resulting from being a national of a state party to a given customs, economic or monetary union or a given international taxation agreement. The existence or otherwise of such exceptions may be a factor in determining the intended scope of the MFN provision.

5 The law on this point is far from settled. The debate stems from the decision in *Maffezini v Spain* ICSID Case No ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, 5 ICSID Rep 396 (2002), where the tribunal held that the claimant was entitled to rely on another bilateral investment treaty that did not contain a requirement to resort to the host state's domestic courts for 18 months before the institution of arbitration. This decision has been followed in one line of later cases. For example, it has been held that an investor was entitled to benefit from a more extensive offer to arbitrate in a different bilateral investment treaty even though the offer in the first treaty was expressly limited: see *RosInvest v Russian Federation* Award on Jurisdiction, October 2007. A different conclusion was reached in *Plama Consortium Ltd v Republic of Bulgaria* ICSID Case No ARB/03/24, Decision on Jurisdiction of 8 February 2005, 20 ICSID Rev FILJ 262 (2005), 44 ILM (2005) 721. For a consideration of the issues see Arbitration Award No 24/2007 *Renta 4 SVSA et al v Russian Federation*, 20 March 2009, SCC. For differing views in the doctrine compare Douglas *The International Law of Investment Claims* (1st Edn, 2009) pp 344-362 and Dolzer and Schreuer *Principles of International Investment Law* (1st Edn, 2008) pp 253-257.

6 Eg the more recent UK IPPAS confirm (for the avoidance of doubt) that most favoured nation treatment applies to listed arts of the IPPA (including the dispute settlement provision).

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#### **486. Expropriation as a treaty standard.**

Almost all bilateral investment treaties (including UK Investment Promotion and Protection Agreements or 'IPPA's<sup>1</sup>) contain a prohibition against expropriation<sup>2</sup>. Such provisions typically prohibit expropriation or measures having effect equivalent to expropriation except where the expropriation is for a public purpose, is not discriminatory and is accompanied by prompt adequate and effective compensation<sup>3</sup>. In order for the conduct of the state to constitute an expropriation the interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use or enjoyment of its investment<sup>4</sup>. The effect of the expropriatory conduct is often considered to be the critical factor, as opposed to the expropriatory intent (or otherwise) of the state<sup>5</sup>. However, general regulatory measures of a state (that is measures that are non-discriminatory, made for a public purpose and enacted with due process) may not be expropriatory in nature and hence will not attract compensation<sup>6</sup>. It is well established that contractual rights may be the subject of an expropriation<sup>7</sup>. However, the mere non-compliance by a government with contractual obligations is not the same thing as, or equivalent to, an expropriation<sup>8</sup>.

1 See PARA 481 note 1.

2 See generally the OECD's International Investment Law, A Changing Landscape (2005) Ch 2. See also Reinisch (ed) *Standards of Investment Protection* (1st Edn, 2008) pp 151-204. As to the relevant principles from previous North Atlantic Free Trade Agreement ('NAFTA') cases and customary international law see *Fireman's Fund Insurance Co v Mexico*, ICSID Case No ARB(AF)/02/1, Award of 17 July 2006, para 176.

3 The precise wording of such provisions varies. Article 5(1) of the 2008 UK model IPPA provides: 'Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.' This wording has changed little since the expropriation provision of the first UK IPPAs, as to which the intention of the drafters was not to go beyond what was thought to represent customary international law: see Denza and Brooks 'Investment Protections Treaties: United Kingdom Experience' 36 ICLQ 908, at 911-912. As to the customary international law in relation to expropriation see PARAS 473-478. As to compensation for breach of an expropriation provision in the treaty context see Ripinsky and Williams *Damages in International Investment Law* (1st Edn, 2008).

4 See *Telenor Mobile Communications AS v Hungary*, ICSID Case No ARB/04/15, Award of 13 September 2006. Various different formulations have been employed, including whether the conduct of the state has effectively neutralised the enjoyment of the property in question (see *Ronald S Lauder v Czech Republic*, UNCITRAL award of 3 September 2001, 9 ICSID Rep 66) or (at its most broad) has the effect of depriving the owner, in whole or in significant part, of the use or reasonably to be expected economic benefit of property (see *Metalclad Corp v Mexico*, Award of 30 August 2000, 40 ILM (2001) 36 para 103).

5 See eg *Metalclad Corp v Mexico*, Award of 30 August 2000, 40 ILM (2001) 36 para 111. See also Dolzer and Schreuer *Principles of International Investment Law* (1st Edn, 2008) pp 101-104.

6 See eg *Methanex Corp v United States*, Award of 8 March 2005, 44 ILM (2005) 1343 at pt IV/D para 7; *Saluka Investments BV v Czech Republic* Partial Award of 17 March 2006, Arbitral Tribunal, para 262. The

proportionality of the measure may also be a factor: see Dolzer and Schreuer *Principles of International Investment Law* (1st Edn, 2008) pp 109-112.

7 This follows from customary international law: see eg *Libyan American Oil Co (LIAMCO) v Libya* 62 Int Law Rep 140 at 189. See also Dolzer and Schreuer *Principles of International Investment Law* (1st Edn, 2008) pp 115-118.

8 See *Waste Management Inc v United Mexican States* ICSID Case No ARB(AF)/00/3, Award of 30 April 2004, 43 ILM (2004) 967 para 175 (where the tribunal concluded that it was necessary to show an effective repudiation of the right, unredressed by any remedies available to the claimant, which has the effect of preventing its exercise entirely or to a substantial extent). Labelling is, however, no substitute for analysis. The words 'confiscatory', 'destroy contractual rights as an asset', or 'repudiation' may serve as a way to describe breaches which are to be treated as extraordinary, and therefore as acts of expropriation, but they do not indicate on what basis the critical distinction between expropriation and an ordinary breach of contract is to be made. The egregiousness of any breach is in the eye of the beholder, and that is not satisfactory for present purposes: see *Azinian v United Mexican States* ICSID Case No ARB(AF)/97/2, Award of 1 November 1999, 39 ILM (2000) 537, 5 ICSID Rep 269 (2002) at para 90.

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#### **487. Freedom of transfer.**

Bilateral investment treaties (including UK Investment Promotion and Protection Agreements or 'IPPA's<sup>1</sup>) generally contain some form of guarantee to investors in relation to the transfer of their investments and returns in a freely convertible currency<sup>2</sup>. Such guarantees are often subject to expressly stated exceptions<sup>3</sup>.

1 See PARA 481 note 1.

2 The wording in recent UK IPPAs is as follows. 'Each contracting party shall in respect of investments guarantee to nationals or companies of the other contracting party the unrestricted transfer of their investments and returns. Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the contracting party concerned. Unless otherwise agreed by the investor transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force': see eg Agreement between the United Kingdom of Great Britain and Northern Ireland and Bosnia and Herzegovina for the Promotion and Protection of Investments (Blackpool, 2 October 2002; TS 37 (2003); Cm 5973) art 6.

3 See Dolzer and Schreuer *Principles of International Investment Law* (1st Edn, 2008) pp 191-194; Reinisch (ed) *Standards of Investment Protection* (1st Edn, 2008) pp 205-243. As to the good faith imposition of such restrictions see *Re Helbert Wagg & Co Ltd* [1956] Ch 323 at 352, [1956] 1 All ER 129 at 142.



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#### **488. Settlement of investment disputes; arbitration under the 1965 ICSID Convention.**

The International Centre for Settlement of Investment Disputes ('ICSID') is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention')<sup>1</sup>. The primary purpose of the ICSID is to provide facilities for conciliation and arbitration of international investment disputes, and many bilateral investment treaties (including UK Investment Promotion and Protection Agreements or 'IPPA's')<sup>2</sup> contain some form of consent to arbitration under the ICSID Convention. In order for the investor to bring a claim under the ICSID Convention, the jurisdictional requirements of the Convention<sup>3</sup> must be satisfied (in addition to the jurisdictional requirements of the given bilateral investment treaty or other source of consent), including that there be a legal dispute arising directly out of an investment, between a contracting state (or any constituent subdivision or agency of a contracting state designated to the ICSID by that state) and a national of another contracting state, which the parties to the dispute consent in writing to submit to the ICSID<sup>4</sup>. Consent of the parties to arbitration under the Convention is, unless otherwise stated<sup>5</sup>, deemed consent to such arbitration to the exclusion of any other remedy<sup>6</sup>. Arbitration under the ICSID Convention is conducted pursuant to the ICSID Arbitration Rules<sup>7</sup>. The Arbitration Act 1996 does not apply to proceedings under the ICSID Convention (with certain exceptions)<sup>8</sup>. Each ICSID contracting state must recognise an award rendered pursuant to the ICSID Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state<sup>9</sup>. There is, however, no derogation from the law in force in any contracting state relating to immunity of that state or of any foreign state from execution<sup>10</sup>.

1    I.e. the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; Cmnd 3255), referred to as the 'Convention on the Settlement of Investment Disputes' or the 'ICSID Convention'. The Convention is set out in the Arbitration (International Investment Disputes) Act 1966: see s 1(1), Schedule; and **ARBITRATION** vol 2 (2008) PARA 1294. As to the ICSID see further **ARBITRATION** vol 2 (2008) PARAS 1295-1297. See also Schreuer's ICSID Convention: A Commentary (2nd Edn, 2009).

2    See PARA 481 note 1.

3    I.e. under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; Cmnd 3255) art 25.

4    See the Arbitration (International Investment Disputes) Act 1966 Schedule art 25. This also provides that when the parties have given their consent, no party may withdraw its consent unilaterally. See further **ARBITRATION** vol 2 (2008) PARA 1296. See also Schreuer's ICSID Convention: A Commentary (2nd Edn, 2009) pp 71-347.

5    Such a statement might be contained in a given investment contract. For an overview of the relevant jurisprudence see Schreuer's ICSID Convention: A Commentary (2nd Edn, 2009) pp 348-413.

6    See the Arbitration (International Investment Disputes) Act 1966 Schedule art 26. See also *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, [2009] 2 All ER (Comm) 37, [2009] 1 WLR 665, where the claimant had commenced ICSID proceedings under a bilateral investment treaty between the Netherlands and Bolivia, and had obtained an attachment order in New York in aid of the ICSID arbitration. The appeal was dismissed on various grounds, including state immunity, but also that arts 26 and 47 of the ICSID Convention and r 39(6) of the ICSID Arbitration Rules taken together meant that the parties had agreed not to seek interim measures before a national court. Article 47 of the ICSID Convention provides: 'Except as the

parties otherwise agree, the tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party' (see the Arbitration (International Investment Disputes) Act 1966 Schedule art 47). Rule 39(6) of the ICSID Arbitration Rules provides: 'Nothing in this rule prevents the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests'.

7 The Rules of Procedure for Arbitration Proceedings (the 'ICSID Arbitration Rules') are available at the ICSID website: see <http://icsid.worldbank.org>.

8 The Arbitration Act 1996 does not apply to proceedings pursuant to the ICSID Convention, but this does not affect the Arbitration Act 1996 s 9 (stay of legal proceedings in respect of matter subject to arbitration): see the Arbitration (International Investment Disputes) Act 1966 s 3(2) (s 3 substituted by the Arbitration Act 1996 Sch 3 para 24). For an example of the application of the Arbitration Act 1996 s 9 in the context of a bilateral investment treaty claim (albeit not an ICSID claim) see *Sancheti v City of London* [2008] EWCA Civ 1283, [2009] 1 Lloyd's Rep 117, (2008) Times, 1 December.

The Lord Chancellor may by order direct that any of the provisions contained in the Arbitration Act 1996 ss 36, 38-44 (provisions concerning the conduct of arbitral proceedings etc) are to apply to such proceedings pursuant to the ICSID Convention as are specified in the order with or without any modifications or exceptions specified in the order: see the Arbitration (International Investment Disputes) Act 1966 s 3(1), (3) (as so substituted). At the date at which this volume states the law, no such order had been made. See also *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, [2009] 2 All ER (Comm) 37, [2009] 1 WLR 665.

9 See the Arbitration (International Investment Disputes) Act 1966 ss 1(2), 2(1) (giving effect to art 54 of the ICSID Convention); and **ARBITRATION** vol 2 (2008) PARAS 1295-1297.

10 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 55. See also *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm), [2006] 1 All ER 284, [2006] 1 WLR 1420, where the investor sought unsuccessfully to enforce an ICSID award through a third party debt and charging order against assets of the National Bank of Kazakhstan held by a private bank in London. The attempt to enforce failed as the court found that the assets belonged to the host state's central bank which benefited from immunity pursuant to the State Immunity Act 1978 s 14(4).

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#### **489. Settlement of investment disputes; other common forms of arbitration.**

Many bilateral investment treaties (including UK Investment Promotion and Protection Agreements or 'IPPA's'<sup>1</sup>) provide to the investor a choice of arbitral procedure which may include arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention')<sup>2</sup>, arbitration pursuant to the Rules of Arbitration of the International Chamber of Commerce ('ICC') or the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, arbitration by an ad hoc tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law (the UNCITRAL Arbitration Rules)<sup>3</sup>. The conduct of such arbitration will be pursuant to the applicable arbitration rules and (except in the case of arbitration pursuant to the ICSID Convention) the law of the seat or place of arbitration<sup>4</sup>. Where the seat or place of the arbitration is in England, Wales or Northern Ireland, the Arbitration Act 1996 will apply<sup>5</sup>, and the arbitral award may be challenged before the English courts<sup>6</sup>. The dispute settlement provision of the bilateral investment treaty may also provide dispute resolution in the courts of the host state as an alternative to arbitration<sup>7</sup>.

1 See PARA 481 note 1.

2 I.e. the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; Cmnd 3255): see PARA 488 note 1.

3 See eg the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments (London, 14 March 1994; TS 27 (1995); Cm 2797) considered in *Sancheti v City of London* [2008] EWCA Civ 1283, [2009] 1 Lloyd's Rep 117, (2008) Times, 1 December.

4 As to the seat of arbitration as a matter of English law see **ARBITRATION** vol 2 (2008) PARA 1212.

5 See **ARBITRATION** vol 2 (2008) PARA 1209.

6 See eg *Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2006] QB 432, [2006] 2 All ER 225, where, in the context of an investment treaty award made in London pursuant to the UNCITRAL Arbitration Rules, the court rejected the claim that a challenge to such an award under the Arbitration Act 1996 s 67 is non-justiciable. In particular, the court rejected the contention that the challenge would require it to enforce or interpret the terms of an unincorporated treaty (cf *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523, HL). The court also considered that the fact that the states party to the treaty deliberately chose to provide for a mechanism for dispute resolution which invoked consensual arbitration, with its domestic legal connotations, should make the English court hesitate before subjecting such arbitration proceedings to special principles of judicial restraint developed in relation to international transactions (cf *Buttes Gas and Oil Co v Hammer* [1982] AC 888, sub nom *Buttes Gas and Oil Co v Hammer (No 2 and No 3)* [1981] 3 All ER 616, HL) or treaties lacking any foundation or incorporation into domestic law. As to non-justiciability see PARA 24 et seq.

7 For a recent consideration of such a provision and the impact on a potential treaty claim where an investor does refer the dispute to the local courts see *Pantechniki SA Contractors & Engineers v Republic of Albania* ICSID Case No ARB/07/21, Award of 30 July 2009.

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## **16. SETTLEMENT OF INTERNATIONAL DISPUTES**

### **(1) METHODS OF SETTLEMENT**

#### **490. In general.**

Members of the United Nations<sup>1</sup> must settle their international disputes by peaceful means<sup>2</sup>. The parties to any dispute whose continuance is likely to endanger the maintenance of international peace and security must seek a solution by non-judicial means (negotiation, inquiry, mediation, conciliation)<sup>3</sup>, by adjudication (arbitration, judicial settlement)<sup>4</sup>, or by resort to regional agencies or arrangements or other means of their own choice<sup>5</sup>. As a matter of European Union Law the United Kingdom, as a Member of the European Union, may be bound to take certain disputes with other member states to the European Court of Justice rather than to any other international tribunal<sup>6</sup>.

1 As to the United Nations see PARA 519 et seq.

2 Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 2 para 3.

3 See PARA 491.

4 See PARA 491.

5 Charter of the United Nations art 33 para 1. Should the Security Council deem it necessary, it must call upon the parties to settle their dispute by such means: art 33 para 2. The General Assembly has repeated and expanded upon the wording of art 33 para 1: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV) of 24 October 1970. The General Assembly amplified it in the Manila Declaration on the Peaceful Settlement of Disputes between States, General Assembly Resolution 37/10, 15 November 1982. As to the Security Council see PARAS 523 et seq. As to the General Assembly see PARA 527 et seq.

6 See Case C-459/03 *EC Commission v Ireland* [2006] ECR I-4635, [20067] All ER (EC) 1013, ECJ.

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## **(2) NON-JUDICIAL SETTLEMENT**

### **491. Negotiation, inquiry, conciliation, mediation, 'good offices'.**

Non-judicial methods of settlement of international disputes refer to procedures involving the exchange of views between the parties to the dispute, either with (in the case of inquiry, mediation, conciliation, and 'good offices') or without (in the case of negotiation) the involvement of a third party (whether a third state or states, a disinterested individual, or an organ of the United Nations<sup>1</sup> or of another international organisation). In an inquiry the third party establishes the precise facts underlying a dispute; in a mediation the third party facilitates negotiations between the parties; the term 'good offices', often used interchangeably with 'mediation', signifies the encouragement and facilitation of negotiations directly between the parties; in conciliation the third party encourages and facilitates negotiations and may itself propose possible bases of a settlement. In practice, in each of these procedures the degree of participation of the third party may vary, and the different types of non-judicial settlement are not watertight categories. They are brought together under the same heading because a settlement reached by these methods need not be based upon the legal rights and duties of the parties.

The chief method by which governments settle international disputes, whether arising in respect of governmental interests or in respect of the treatment of the state's nationals, is by direct negotiation between the governments of the states concerned<sup>2</sup>. In some circumstances states may be obliged by treaty<sup>3</sup> to seek a solution to their disagreements by negotiation<sup>4</sup>, often as a preliminary step before resort to other means of settlement<sup>5</sup>. There is, however, no general requirement in international law to exhaust negotiations before a dispute is taken to an international tribunal<sup>6</sup>.

The other methods of non-judicial settlement appear in various major international treaties, again usually as a preliminary step before resort to other (mostly adjudicatory) means<sup>7</sup>. The United Nations as well as its subsidiary bodies and other international organisations have adopted model rules on conciliation and other methods of non-judicial dispute settlement<sup>8</sup>. Arrangements for all non-judicial methods of dispute settlement can be made ad hoc<sup>9</sup>.

1 The General Assembly and the Security Council of the United Nations may recommend the use of good offices or mediation by a member state or an agency or to offer their own: Charter of the United Nations arts (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) 14, 36, 37 para 2.

2 *Mavrommatis Palestine Concessions* PCIJ Ser A No 2 at 13 (1924).

3 As to the meaning of 'treaty' see PARA 71.

4 Negotiation is one of the methods of peaceful settlement of disputes enumerated in the Charter of the United Nations art 33 para 1: see PARA 490 et seq.

The obligation to negotiate does not include an obligation to reach agreement: *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys) Case* PCIJ Ser A/B No 42, 108 at 116 (1931). However, in the *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ICJ Reports 1996, 226 at 263 reference was made to the 'obligation of states to pursue negotiations for nuclear disarmament and bring them to a successful completion'.

5 Eg see the Treaty Concerning the Establishment of the Republic of Cyprus (Nicosia, 16 August 1960; TS 4 (1961); Cmdn 1252) art 10; the United Nations Convention on the Law of the Sea (Montego Bay, 10 December

1982; TS 81 (1999); Cmnd 4524) art 283 para 1; the World Trade Organisation Agreement (Marrakesh, 15 April 1994; TS 57 (1996) Cm 3277), Annex 2 establishing the Understanding on Rules and Procedures Governing the Settlement of Disputes art 3 para 7, art 4.

6 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Preliminary Objections)* ICJ Reports 1998, 275. An obligation to enter into negotiations cannot delay legal proceedings if one party refuses to negotiate: *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* ICJ Reports 1980, 3.

7 Eg see the Charter of the United Nations art 33 para 1; the United Nations Convention on the Law of the Sea art 284; the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures Governing the Settlement of Disputes arts 5 and 24 para 2.

8 See eg the United Nations Model Rules for the Conciliation of Disputes between States 30 ILM (1991) 229; adopted as General Assembly Resolution 50/50 of 11 December 1995; the Permanent Court of Arbitration *Optional Conciliation Rules* (1996); the Permanent Court of Arbitration *Optional Rules for Fact-finding Commissions of Inquiry* (1997); the Permanent Court of Arbitration *Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment* (2002); the United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules (1980) adopted as General Assembly Resolution 35/52 of 4 December 1980; the UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use (2002); and the International Chamber of Commerce Alternative Dispute Resolution Rules (1 July 2001).

9 For an instance where ad hoc provision for inquiry was made see the Exchange of Notes between Great Britain and Denmark establishing a Commission of Enquiry to investigate certain Incidents affecting the British trawler 'Red Crusader' (London, 15 November 1961; TS 118 (1961); Cmnd 1575); for an account of the report, which contained opinions on law as well as fact, see *Contemporary Practice of the United Kingdom in the Field of International Law* 1962 (I) 50-53.

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### **(3) ADJUDICATION**

#### **(i) Arbitration**

##### **492. In general.**

Arbitration denotes the determination of a difference between states or between a state and a non-state entity by a legal decision of a tribunal consisting of one or more arbitrators that is established by the parties for the specific purpose of resolving a particular dispute<sup>1</sup> or class of disputes, and is thus not a permanent tribunal such as the International Court of Justice<sup>2</sup>. The tribunal consists of persons selected by the parties<sup>3</sup>. The award is generally binding upon the parties, and, unless the parties stipulate otherwise, is based upon rules of international law.

<sup>1</sup> Arbitral tribunals have frequently been created to deal with particular boundary disputes, and with disputes concerning the treatment of foreign investors.

<sup>2</sup> Arbitration is a method mentioned in the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 33 para 1 (see PARA 490). For examples of multilateral conventions providing for arbitration see: the Convention for the Pacific Settlement of International Disputes (The Hague, 18 October 1907; TS 6 (1971); Cmd 4575) art 37; the European Convention for the Peaceful Settlement of Disputes (Strasbourg, 29 April 1957; TS 10 (1961); Cmd 1298); and the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 (Washington, 18 March 1965; TS 25 (1967); Cmd 3255). As to the International Court of Justice see PARA 499 et seq. As to the meaning of 'treaty' see PARA 71.

<sup>3</sup> For the right of states parties to a case before the International Court of Justice to select ad hoc judges to sit with the permanent judges see the Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 31 paras 2-6; and PARA 500.

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#### **493. Ad hoc arbitration.**

Parties to a particular dispute may at any time agree to refer the dispute to arbitration. The parties retain control over the establishment of the arbitral tribunal and the appointment of its members, its terms of reference, its rules of procedure, the applicable law<sup>1</sup>, and the legal effect of the award to be rendered, including whether it will be subject to interpretation, revision, appeal, or nullification. This will be stipulated in the arbitration agreement or *compromis*, which creates the tribunal and limits its jurisdiction. In case the parties have not provided for an eventuality, the tribunal will decide under its competence to determine its own jurisdiction. This competence includes the power to interpret any provision in the *compromis*<sup>2</sup>.

There are 'model' or 'optional' rules that parties can incorporate in their *compromis*, so as to avoid having to draw up a full set of provisions regarding the tribunal's establishment, rules of procedure, and the like. Prominent among these are the various Optional Rules devised by the Permanent Court of Arbitration<sup>3</sup>, while the International Law Commission has also devised Model Rules of Arbitral Procedure<sup>4</sup>.

1 If no applicable law is specified, international law will be applicable in inter-state disputes: *Norwegian Shipowners Claims* 2 RIAA 309 at 331 (1922); *The Matter of the Diverted Cargoes Arbitration (Greece v Great Britain)* (1955) 22 Int LR 820 at 824. See also the Convention for the Pacific Settlement of International Disputes 1907 art 37. For power to decide ex aequo et bono see the European Convention for the Peaceful Settlement of Disputes (Strasbourg, 29 April 1957; TS 10 (1961); Cmnd 1298) art 30.

2 *The Betsey* (1802) 4 Moore Int Arb 81 at 85 per Lord Loughborough; Convention for the Pacific Settlement of International Disputes (The Hague, 29 July 1889; TS 9 (1901); Cd 798) art 48; Convention for the Pacific Settlement of International Disputes (The Hague, 18 October 1907; TS 6 (1971); Cmnd 4575) art 73. See also the *Nottebohm (Liechtenstein v Guatemala) (Preliminary Objection)* ICJ Reports 1953, 111 at 119.

3 See the Permanent Court of Arbitration *Optional Rules for Arbitrating Disputes between Two States* (1992); the Permanent Court of Arbitration *Optional Rules for Arbitrating Disputes between Two Parties of which Only One is A State* (1993); the Permanent Court of Arbitration *Optional Rules for Arbitration involving International Organizations and States* (1996); the Permanent Court of Arbitration *Optional Rules for Arbitration between International Organizations and Private Parties* (1996); the Permanent Court of Arbitration *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment* (2001). As to the Permanent Court of Arbitration see PARA 495.

4 See the United Nations *Yearbook of the International Law Commission* Vol II (1958). States may also choose to utilise model rules drawn up primarily for the purposes of commercial arbitration, such as the United Nations Commission on International Trade Law arbitration rules (recommended in General Assembly Resolution 31/98 of 15 December 1976) or the rules of one of the national arbitration centres such as the London Court of International Arbitration or the Stockholm Chamber of Commerce.



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**494. Institutional arbitration.**

'Institutional arbitration' or 'administered arbitration' refers to the settlement of disputes by arbitration procedures administered by a standing international body, such as the Permanent Court of Arbitration<sup>1</sup>, and the International Centre for the Settlement of Investment Disputes<sup>2</sup>. The standing body does not itself decide the dispute: it acts as the secretariat for arbitral tribunals established on an ad hoc basis under its auspices.

1 As to the Permanent Court of Arbitration see PARA 495.

2 As to the International Centre for the Settlement of Investment Disputes see PARA 496.

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#### **495. Permanent Court of Arbitration.**

The Permanent Court of Arbitration (the 'PCA') was established in 1899 as a facility through which states parties to the Hague Conventions of 1899 and 1907 may establish ad hoc arbitral tribunals to hear particular cases<sup>1</sup>. The only permanent organ of the PCA, which is based in The Hague, is the International Bureau, which functions as a registry for the tribunals thus established<sup>2</sup>.

1 See the Convention for the Pacific Settlement of International Disputes (The Hague, 29 July 1899; TS 9 (1901); Cd 798) art 20 et seq; and the Convention for the Pacific Settlement of International Disputes (The Hague, 18 October 1907; TS 6 (1971); Cmnd 4575). The latter convention contains detailed rules governing the arbitration procedure (arts 51-85) and rules for arbitration by summary procedure (arts 86-90).

2 See the Convention for the Pacific Settlement of International Disputes (The Hague, 18 October 1907; TS 6 (1971); Cmnd 4575) art 43.

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#### **496. International Centre for the Settlement of Investment Disputes.**

The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States<sup>1</sup> established the International Centre for Settlement of Investment Disputes ('ICSID') for the purpose of providing for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention<sup>2</sup>. The ICSID has an Administrative Council and a Secretariat as its permanent organs, located at the World Bank headquarters in Washington DC<sup>3</sup>.

ICSID jurisdiction is limited to disputes arising 'directly out of an investment' between a contracting state and a national of another contracting state, when the parties to the dispute have agreed in writing to refer the dispute to the Centre<sup>4</sup>. Many bilateral investment protection treaties and investment agreements include provisions for the arbitration of disputes under the auspices of ICSID<sup>5</sup>. Further, certain multilateral treaties such as the North American Free Trade Agreement<sup>6</sup> and the Energy Charter Treaty<sup>7</sup> provide for ICSID arbitration of disputes arising under them, activated simply by initiation of proceedings by the investor<sup>8</sup>.

ICSID maintains a list ('Panel') of arbitrators and conciliators, nominated by the contracting states and by the Chairman of its Administrative Council, who is also the President of the World Bank<sup>9</sup>. ICSID Tribunals operate under rules laid down by ICSID<sup>10</sup>. Any party to the proceedings has the power to order provisional measures<sup>11</sup>.

ICSID awards are binding on the parties to the dispute, and are not subject to any appeal or other remedy not provided for by ICSID convention<sup>12</sup>. An award may be annulled on the grounds that the tribunal was improperly constituted, that it manifestly exceeded its powers, that there was corruption on the part of a member of the tribunal, that there was a serious departure from a fundamental rule of procedure, or that no reasons were stated for the award<sup>13</sup>. Awards under ICSID Convention are enforceable in all contracting states as if they are final judgments of the state's own courts<sup>14</sup>, but they remain subject to the laws of the state concerning sovereign immunity<sup>15</sup>.

1    le the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (Washington, 18 March 1965; TS 25 (1967); Cmdd 3255). The Convention is set out in the Schedule to the Arbitration (International *Investment Disputes*) Act 1966: see s 1; and **ARBITRATION** vol 2 (2008) PARA 1294 et seq.

2    See the Convention on the Settlement of Investment Disputes between States and Nationals of Other States art 1; and **ARBITRATION** vol 2 (2008) PARA 1295.

3    See the Convention on the Settlement of Investment Disputes between States and Nationals of Other States arts 2-3; and **ARBITRATION** vol 2 (2008) PARA 1295.

4    See the Convention on the Settlement of Investment Disputes between States and Nationals of Other States art 25; and **ARBITRATION** vol 2 (2008) PARA 1296.

5    See eg *Asian Agricultural Products Ltd v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award of 27 June 1990, 4 ICSID Rep 246, 30 ILM (1991) 557, based on the 1980 Treaty between the UK and Sri Lanka, where the recourse by AAPL was enough to immediately establish ICSID jurisdiction. Other UK treaties may require that a certain period of negotiation or pursuit of local remedies be exhausted without leading to resolution of the dispute before recourse to ICSID can be made.

6    North American Free Trade Agreement (17 December 1992; US Government Printing Office 1992).

- 7 Energy Charter Treaty (Lisbon, 17 December 1994; Misc 6 (1995); Cm 2952).
- 8 See the North American Free Trade Agreement art 1120; and the Energy Charter Treaty.
- 9 See the Convention on the Settlement of Investment Disputes between States and Nationals of Other States arts 3, 5, 13. States are not confined to the names on the lists in their choice of arbitrators and conciliators.
- 10 See the ICSID Rules of Procedure for Arbitration Proceedings.
- 11 See the ICSID Rules of Procedure for Arbitration Proceedings r 39(1).
- 12 See the Convention on the Settlement of Investment Disputes between States and Nationals of Other States art 53.
- 13 See the Convention on the Settlement of Investment Disputes between States and Nationals of Other States art 52.
- 14 See the Convention on the Settlement of Investment Disputes between States and Nationals of Other States art 54. See also the Arbitration (International *Investment Disputes*) Act 1966 ss 1, 2; and **ARBITRATION** vol 2 (2008) PARA 1294 et seq.
- 15 See the Convention on the Settlement of Investment Disputes between States and Nationals of Other States art 55. As to immunity from jurisdiction see PARA 274.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/16. SETTLEMENT OF INTERNATIONAL DISPUTES/(3) ADJUDICATION/(i) Arbitration/497. Arbitration under the United Nations Convention on the Law of the Sea.

#### **497. Arbitration under the United Nations Convention on the Law of the Sea.**

The United Nations Convention on the Law of the Sea<sup>1</sup> establishes a system for the compulsory resolution of certain categories of dispute concerning the interpretation and application of the Convention<sup>2</sup>. States may make declarations<sup>3</sup> choosing one or more of the following procedures for the settlement of disputes<sup>4</sup>: (1) the International Tribunal for the Law of the Sea<sup>5</sup>; (2) the International Court of Justice<sup>6</sup>; (3) an arbitral tribunal<sup>7</sup>; or (4) a special arbitral tribunal<sup>8</sup>.

A state party to a dispute that is not covered by a declaration in force will be deemed to have accepted arbitration in accordance with the arbitration provisions of the Convention<sup>9</sup>. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may only be submitted to that procedure, unless the parties otherwise agree<sup>10</sup>. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with the arbitration provisions of the Convention<sup>11</sup>, unless the parties otherwise agree<sup>12</sup>.

1 The United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524).

2 See the United Nations Convention on the Law of the Sea Pt XV (arts 279-299) and in particular art 286. For excluded categories of dispute see arts 297-298.

3 Declarations of such choices must be deposited with the Secretary-General of the United Nations: see the United Nations Convention on the Law of the Sea art 287 para 8.

4 United Nations Convention on the Law of the Sea art 287. A state may select different procedures for different categories of case.

5 United Nations Convention on the Law of the Sea art 287 para 1(a). The International Tribunal for the Law of the Sea is established under Annex VI of the Convention: see PARA 514.

6 United Nations Convention on the Law of the Sea art 287 para 1(b). As to the International Court of Justice see PARA 499 et seq.

7 United Nations Convention on the Law of the Sea art 287 para 1(c). An arbitral tribunal mentioned in the text is one constituted in accordance with Annex VII of the Convention. Unless the parties otherwise agree, the following provisions apply to the constitution of an arbitral tribunal for the purpose of proceedings under Annex VII of the Convention: Annex VII art 3. The arbitral tribunal consists of five members, one chosen by each of the parties and the other three by the parties jointly: Annex VII art 3(a)-(d). A list of persons nominated by states who might act as arbitrators is maintained, but parties need not choose arbitrators from that list: see Annex VII art 2, 3. At the date at which this volume states the law the list, which includes persons available for the conciliation of disputes, is available on the United Nations website. Unless the parties to the dispute otherwise agree, the arbitral tribunal is to determine its own procedure, assuring to each party a full opportunity to be heard and to present its case: see Annex VII art 5. The award of the tribunal is final, unless the parties to the dispute have agreed in advance to an appellate procedure: see Annex VII art 11. The award of the arbitral tribunal must be confined to the subject-matter of the dispute and state the reasons on which it is based: see Annex VII art 10.

8 United Nations Convention on the Law of the Sea art 287 para 1(d). A special arbitral tribunal mentioned in the text is one constituted in accordance with Annex VIII of the Convention. Annex VII arts 4-13 (see note 7) apply mutatis mutandis to the special arbitration proceedings in accordance with Annex VIII: Annex VIII art 4. Annex VIII special arbitral tribunals are competent with respect to disputes concerning: (1) fisheries; (2) protection and preservation of the marine environment; (3) marine scientific research; or (4) navigation, including pollution from vessels and by dumping: see Annex VIII art 1. A list of experts is maintained in respect of heads (1) to (4) above: Annex VIII art 2. The states party to the Convention are entitled to nominate two experts in each field: Annex VIII art 2 para 3. A special arbitral tribunal consists of five members: Annex VIII art

3(a). Each party to the dispute may appoint two members, preferably from the appropriate list: Annex VIII art 3(b), (c). One member appointed by each party may be its national: Annex VIII art 3(b), (c). The parties to the dispute are to appoint by agreement the president of the special arbitral tribunal, chosen preferably from the appropriate list: Annex VIII art 3(d). The president must be a national of a third state, unless the parties otherwise agree: Annex VIII art 3(d). The special arbitral tribunals may be used by the parties to a dispute, if they so agree, to carry out an inquiry and establish the facts giving rise to the dispute: Annex VIII art 5 para 1. If all the parties to the dispute so request, the special arbitral tribunal may formulate recommendations which, without having the force of a decision, will only constitute the basis for a review by the parties of the questions giving rise to the dispute: Annex VIII art 5 para 3.

9 United Nations Convention on the Law of the Sea art 287 para 3. The arbitration provisions mentioned in the text are those set out in Annex VII to the Convention (see [PARA 497](#)).

10 United Nations Convention on the Law of the Sea art 287 para 4.

11 In accordance with the United Nations Convention on the Law of the Sea Annex VII (see [PARA 497](#)).

12 United Nations Convention on the Law of the Sea art 287 para 5.

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#### **498. World Trade Organisation Panels.**

The World Trade Organisation ('WTO')<sup>1</sup> system of dispute settlement is contained in the Dispute Settlement Understanding<sup>2</sup>. The system is administered by the WTO Dispute Settlement Body<sup>3</sup>, which has the power to establish panels for hearing disputes, to adopt reports from panels and from the Appellate Body<sup>4</sup>, to maintain surveillance of implementation of rulings and recommendations, and to authorise suspension of trade concessions and other WTO obligations<sup>5</sup>. Upon notification by one party to a dispute concerning agreements or commitments made in the WTO, the other party or parties must join in consultations<sup>6</sup>. Good offices<sup>7</sup>, conciliation<sup>8</sup> and mediation<sup>9</sup> are offered to assist the parties in reaching a solution<sup>10</sup>. Should the dispute not be resolved it must be submitted, if the complainant requests, to a panel to be established by the Dispute Settlement Body unless the latter resolves by consensus not to do so<sup>11</sup>.

A panel consists of three members proposed to the parties by the WTO Secretariat<sup>12</sup>. If there is no agreement on panellists within 20 days after the date of the establishment of a panel, at the request of either party, the Director General<sup>13</sup>, in consultation with the Chairman of the relevant Council<sup>14</sup> or Committee<sup>15</sup>, will determine the composition of the panel by appointing the panellists whom the Director General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute<sup>16</sup>. The terms of reference of the panel may be drawn up by the chairman of the Disputes Settlement Body in consultation with the parties<sup>17</sup>. Panel reports are automatically adopted by the Dispute Settlement Body unless a party to the dispute appeals against the report or the Disputes Settlement Body decides by consensus not to adopt it<sup>18</sup>. A party to a dispute may appeal to the Appellate Body against a final panel report<sup>19</sup> but only on a point of law covered in the panel report and the legal interpretation developed by the panel<sup>20</sup>.

Unless otherwise agreed by the parties to the dispute, the period from the date of establishment of the panel by the Dispute Settlement Body until the date the Dispute Settlement Body considers the panel report for adoption must as a general rule not exceed nine months where the panel report is not appealed<sup>21</sup>. The member states involved must explain their intentions regarding compliance with recommendations contained in the panel report<sup>22</sup>. The Dispute Settlement Body keeps compliance under surveillance<sup>23</sup>. If a member state fails to comply with recommendations, the complainant state may request the authority of the Dispute Settlement Body to suspend the application to the defaulting member of concessions or other obligations<sup>24</sup>. If that member objects to the level of suspension authorised, the matter must be referred to arbitration<sup>25</sup>. The decision of the arbitrator is final<sup>26</sup>.

1 As to the World Trade Organisation see PARA 461.

2 *I.e.* the World Trade Organisation Agreement (Marrakesh, 15 April 1994; TS 57 (1996); Cm 3277) Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes. Authoritative interpretation of the World Trade Organisation Agreement and of the associated agreements is vested in the World Trade Organisation Ministerial Conference and General Council: see the World Trade Organisation Agreement art IX para 2.

3 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 2 para 1. The General Council of the World Trade Organisation acts as the Dispute Settlement Body: World Trade Organisation Agreement art IV para 3; and see PARA 461.

4 As to the Appellate Body see PARA 515.

5 World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 2 para 1.

6 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 4.

7 As to good offices see PARA 491.

8 As to conciliation see PARA 491.

9 As to mediation see PARA 491.

10 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 5.

11 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 6 para 1.

12 World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 8 para 5. This holds true unless the parties to a dispute agree, within ten days from the establishment of the panel, to a panel composed of five panellists: art 8 para 5. As to the composition of panels see art 8 para 1. Panellists sit in their individual capacity: art 8 para 9. As to procedures for multiple complainants see art 9. As to the interests of third parties see art 10. As to the World Trade Organisation Secretariat see PARA 461.

13 As to the Director General see PARA 461.

14 As to the General Council see PARA 461.

15 As to the Committees see PARA 461.

16 World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 8 para 7.

17 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 7. As to the function of panels see art 11. As to their procedures see art 12, Appendix 3.

18 World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 16. As to confidentiality see art 14. As to the interim review stage see art 15.

19 Only parties to the dispute, not third parties, may appeal a panel report: World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 17 para 4. Third parties who have notified the Dispute Settlement Body of a substantial interest in the matter pursuant to art 10 para 2 may make submissions to, and be heard by, the Appellate Body: art 17 para 4.

20 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 17 para 6.

21 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 20.

22 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 21 para 3.

23 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 21.

24 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 22 para 2.

25 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 22 para 6.



26 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 22 para 7.

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## **(ii) Permanent International Courts and Tribunals**

### **A. THE INTERNATIONAL COURT OF JUSTICE**

#### **499. Organisation.**

The International Court of Justice, which is the principal judicial organ of the United Nations<sup>1</sup>, consists of 15 judges, no two of whom may be nationals of the same state<sup>2</sup>. They are elected for periods of nine years<sup>3</sup> by the General Assembly and the Security Council proceeding independently of each other<sup>4</sup> from a list of persons nominated by the national groups in the Permanent Court of Arbitration<sup>5</sup>. The President and Vice-President are elected for three years by the court<sup>6</sup>, as are the Registrar and other necessary officers<sup>7</sup>. Members of the court, when engaged upon its business, enjoy diplomatic privileges and immunities<sup>8</sup>.

1 Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 1; Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 92. The Statute of the International Court of Justice forms an integral part of the charter and is annexed thereto: art 92.

2 Statute of the International Court of Justice art 3 para 1. Otherwise they are elected regardless of nationality, although all main forms of civilization and the principal legal systems of the world must be represented: see arts 2, 9. Their qualification must be either that they are persons who possess the qualifications required in their respective countries for appointment to the highest judicial office or are jurists of recognised competence in international law: art 2. As to ad hoc judges see PARA 500.

3 Statute of the International Court of Justice art 13 para 1. Judges are eligible for re-election: art 13 para 1. As to resignation see art 13 para 4. As to dismissal see art 18. Restrictions are imposed upon the judges' exercise of professional, administrative or political functions and activities: see art 16. No member of the court may act as agent, counsel or advocate in any case (art 17 para 1), or participate in the decision of any case in which he has so previously acted or has acted as a member of a tribunal or in any other capacity (art 17 para 2).

4 Statute of the International Court of Justice art 8.

5 See the Statute of the International Court of Justice arts 5-7. As to the Permanent Court of Arbitration see PARA 495. As to the elections see arts 10-13. As to the filling of vacancies see arts 14, 15.

6 Statute of the International Court of Justice art 21 para 1. They may be re-elected: art 21 para 1. The President must reside at the seat of the court (art 22 para 2), which is at The Hague (art 22 para 1), although the court may sit and exercise its functions elsewhere (art 22 para 1).

7 Statute of the International Court of Justice art 21 para 2. The Registrar must also reside at The Hague: art 22.

8 Statute of the International Court of Justice art 19. For United Kingdom law as to the privileges and immunities of persons connected with the court see PARA 314.

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### **500. Sittings; ad hoc judges.**

The full court must sit<sup>1</sup>, unless it forms a chamber for any case or class of cases<sup>2</sup>. A quorum is nine judges<sup>3</sup>. Judges of the nationality of the parties to the case retain their right to sit<sup>4</sup>. In a case in which the court includes a judge of the nationality of one of the parties, any other party may choose a person to sit as judge<sup>5</sup>; if there is no judge of the nationality of either party, each may appoint one<sup>6</sup>. The court lays down its own rules of procedure and practice directions<sup>7</sup>.

1 Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 25 para 1. As to dispensation of judges from sitting see art 25 para 2. As to the Statute of the International Court of Justice see PARA 499 note 1.

2 As to chambers see PARA 501.

3 Statute of the International Court of Justice art 25 para 3. As to the abstention or disqualification of a judge from sitting in a particular case see art 24.

4 Statute of the International Court of Justice art 31 para 1.

5 Statute of the International Court of Justice art 31 para 2.

6 Statute of the International Court of Justice art 31 para 3.

7 Statute of the International Court of Justice art 30 para 1. The Court may provide in its rules for assessors to sit: art 30 para 2. The Rules of Court in force at the date at which this volume states the law are those adopted on 14 April 1978, which are available at the date this volume states the law at [www.icj-cij.org](http://www.icj-cij.org).

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## 501. Chambers.

The International Court of Justice<sup>1</sup> may form one or more chambers for dealing with particular categories of cases<sup>2</sup> and may at any time form a chamber for dealing with a particular case<sup>3</sup>. The number of judges to constitute such a chamber is determined by the court with the approval of the parties<sup>4</sup>. The court forms annually a chamber composed of five judges to hear and determine cases by summary procedure<sup>5</sup>. A judgment of a chamber is considered a judgment of the court<sup>6</sup>.

1 As to the International Court of Justice see PARA 499.

2 Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 26 para 1. As to the Statute of the International Court of Justice see PARA 499 note 1.

3 Statute of the International Court of Justice art 26 para 2.

4 Statute of the International Court of Justice art 26 para 2. Chambers were requested by the parties in the Case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* ICJ Reports 1984, 246; *Frontier Dispute (Burkina Faso/Republic of Mali)* ICJ Reports 1986, 554; *Eletronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Reports 1989, 15; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) (Constitution of a Chamber)* ICJ Reports 1987, 10. A chamber is subject to the court only with regard to its composition, and once it is constituted it is for all purposes the court itself: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) (Application for Permission to Intervene)* ICJ Reports 1990, 92. It is unclear whether the court is obliged to create a chamber under the Statute of the International Court of Justice art 26 para 2 if the parties request it to do so.

5 See the Statute of the International Court of Justice art 29.

6 Statute of the International Court of Justice art 27.

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**502. Access to the court.**

Only states may be parties to contentious proceedings before the International Court of Justice<sup>1</sup>. The Court is open to all states parties to its statute<sup>2</sup>; and the Security Council of the United Nations may lay down conditions under which other states may have access to the court<sup>3</sup>.

1 See the Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 34 para 1. For the cases in which international organisations may be informed of proceedings and asked for information see art 34 paras 2, 3. Bodies, such as the UN General Assembly and Security Council, authorised by or in accordance with the UN Charter may request Advisory Opinions from the Court: see art 65; and see PARA 512. As to the International Court of Justice see PARA 499. As to the Statute of the International Court of Justice see PARA 499 note 1.

2 Statute of the International Court of Justice art 35 para 1. All states members of the United Nations are automatically parties to the statute. States not members may become parties under the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 93 para 2.

3 Statute of the International Court of Justice art 35 para 2. Such states may not be placed on a footing of inequality with respect to other parties: art 35 para 2. For conditions of access for such states see Security Council Resolution 9 (1946) 15 October 1946.

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### 503. Jurisdiction.

The jurisdiction of the International Court of Justice<sup>1</sup> derives from the consent of the parties<sup>2</sup>. It comprises all cases which the parties agree to refer to it<sup>3</sup>, and all matters specially provided for in the Charter of the United Nations<sup>4</sup> or in treaties<sup>5</sup> or conventions<sup>6</sup> in force<sup>7</sup>. Disputes as to jurisdiction are settled by decision of the court<sup>8</sup>.

1 As to the International Court of Justice see PARA 499.

2 See eg the *Anglo-Iranian Oil Co Case (United Kingdom v Iran) (Preliminary Objections)* ICJ Reports 1952, 93; *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States of America) (Jurisdiction)* ICJ Reports 1954, 19.

3 The parties may refer a dispute to the court by specific agreement (*compromis*). An example is the *Minquiers and Ecrehos Case (France/United Kingdom)* ICJ Reports 1953, 47. As to what amounts to an agreement see *Aegean Sea Continental Shelf (Greece v Turkey) (Interim Protection)* ICJ Reports 1976, 3. The Court also has jurisdiction when a party makes a unilateral reference of a dispute to the court, which the other party expressly or impliedly accepts. As to this see generally *Right of Minorities in Upper Silesia (Minority Schools) (Preliminary Objection)* PCIJ Ser A No 15 (1928); *Corfu Channel (United Kingdom v Albania) (Preliminary Objection)* ICJ Reports 1948, 15; and cf *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* ICJ Reports, 4 June 2008 (para 39 et seq). The maintaining of an objection to the jurisdiction by the respondent state does not amount to consent: *Anglo-Iranian Oil Co Case (United Kingdom v Iran) (Preliminary Objections)* ICJ Reports 1952, 93. As to how under such an agreement the court may be seised of a case see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility)* ICJ Reports 1994, 112; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility)* ICJ Reports 1995, 6.

4 Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015). There appear to be no matters specifically provided for. The only provision to which these words could refer is art 36 para 3, which enables the Security Council to recommend to the parties in dispute recourse to the court: see *Corfu Channel (United Kingdom v Albania) (Preliminary Objection)* ICJ Reports 1948, 15 at 31.

5 As to the meaning of 'treaty' see PARA 71.

6 This is effected by means of a compromissory clause in a multilateral or bilateral treaty. There are many of these. For a list of such treaties see the current Yearbook of the International Court of Justice, and the ICJ's website (available at the date at which this volume states the law at [www.icj-cij.org](http://www.icj-cij.org)). Where a treaty or convention in force provides for reference of a matter to the Permanent Court of International Justice, then, as between the parties to the Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015), the matter must now be referred to that latter court: see *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Preliminary Objection)* ICJ Reports 1964, 6. An example of a case in which jurisdiction was founded on a compromissory clause is the *Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12.

7 Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 36 para 1. As to the Statute of the International Court of Justice see PARA 499 note 1. Note that as a matter of European Union Law the United Kingdom may be obliged to adjudicate certain categories of dispute with any other member state only before the European Court of Justice: see Case C-459/03 *EC Commission v Ireland* [2006] ECR I-4635, [2006] All ER (EC) 1013, ECJ.

8 Statute of the International Court of Justice art 36 para 6. See *Nottebohm (Liechtenstein v Guatemala) (Preliminary Objection)* ICJ Reports 1953, 111 at 119.

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#### **504. The optional clause.**

According to the so-called 'optional clause', a state may at any time declare that it recognises as compulsory, ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice<sup>1</sup> in all legal disputes concerning<sup>2</sup>: (1) the interpretation of a treaty<sup>3</sup>; (2) any question of international law<sup>4</sup>; (3) the existence of any fact which, if established, would constitute a breach of an international obligation<sup>5</sup>; or (4) the nature or extent of the reparation to be made for the breach of an international obligation<sup>6</sup>. A declaration is a unilateral act of the state which makes it, but it creates a series of bilateral relationships with other states which also make declarations<sup>7</sup>.

1 As to the International Court of Justice see PARA 499.

2 Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 36 para 2. Declarations must be deposited with the Secretary-General of the United Nations who must transmit copies to the parties to the Statute and to the Registrar of the Court: art 36 para 4. For a list of declarations made under the Statute of the International Court of Justice art 36 para 2 see the current Yearbook of the International Court of Justice, and the ICJ's website (available at the date at which this volume states the law at [www.icj-cij.org](http://www.icj-cij.org)). Declarations made under the corresponding provision of the Statute of the Permanent Court of International Justice must now be treated as acceptances of the compulsory jurisdiction of the International Court of Justice: Statute of the International Court of Justice art 36 para 5. However, this is subject to the respondent state having been a party to the Statute of the ICJ in 1945: *Aerial Incident of 27 July 1955 (Israel v Bulgaria) (Preliminary Objections)* ICJ Reports 1959, 127; cf *Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Preliminary Objections)* ICJ Reports 1961, 17.

3 Statute of the International Court of Justice art 36 para 2(a). As to the meaning of 'treaty' see PARA 71.

4 Statute of the International Court of Justice art 36 para 2(b).

5 Statute of the International Court of Justice art 36 para 2(c).

6 Statute of the International Court of Justice art 36 para 2(d).

7 So, once state A has filed a declaration with the United Nations Secretary-General, state B cannot, unless it has reserved the right to do so, withdraw its declaration so as to deprive the court of jurisdiction over a case between A and B of which it is already seised: *Right of Passage over Indian Territory (Portugal v India) (Preliminary Objection)* ICJ Reports 1957, 125; *Nuclear Tests (Australia v France)* ICJ Reports 1974, 253; *Nuclear Tests (New Zealand v France)* ICJ Reports 1974, 457; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* ICJ Reports 1984, 392.

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### 505. Optional clause reservations.

Declarations accepting the compulsory jurisdiction of the International Court of Justice<sup>1</sup> may be made unconditionally or on condition of reciprocity or for a certain time<sup>2</sup>. Many declarations have, however, contained other types of reservation<sup>3</sup>. Examples of these are: (1) reservations of matters which, by international law, are within the domestic jurisdiction of the state<sup>4</sup>; (2) reservations of disputes which arose before a certain date and out of facts which existed before that date<sup>5</sup>; and (3) reservations of disputes in regard to which the parties have agreed or will agree to have recourse to some other method of settlement<sup>6</sup>. On a basis of reciprocity the declarations of the parties to a case may be read together, thus permitting the respondent state to rely on a reservation or condition to be found not in its own declaration but in the declaration of the applicant state alone<sup>7</sup>.

1 As to the International Court of Justice see PARA 499.

2 Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 36 para 3. 'A certain time' may, for example, be a period of ten years or until notice to withdraw. However, once the court is seised of a dispute, the subsequent termination of a declaration by a party does not deprive the court of jurisdiction: *Nottebohm (Liechtenstein v Guatemala) (Preliminary Objection)* ICJ Reports 1953, 111. As to the Statute of the International Court of Justice see PARA 499 note 1.

3 The United Kingdom Declaration concerning the Optional Clause of the Statute of the International Court of Justice (New York, 5 July 2004; TS 50 (2004); Cm 6454) gives the court jurisdiction over disputes arising after 1 January 1974 with regard to subsequent situations or facts other than: (1) where the United Kingdom has agreed with the other party or parties to a dispute to settle by some other method of peaceful settlement; (2) a dispute with a country which is or has been a Member of the Commonwealth; or (3) a dispute with a party which has only accepted the compulsory jurisdiction in relation to or for the purposes of that dispute or where the acceptance of compulsory jurisdiction by the other party was deposited less than 12 months prior to the filing of the application before the court. The declaration is made on condition of reciprocity and is subject to the right to terminate on notice. The right to add to, amend or withdraw any reservation is preserved: see Letter No 2. States are free to make such reservations though they are not expressly permitted by the Statute of the International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* ICJ Reports 1984, 392.

4 This is strictly unnecessary, for a plea that a matter is within the domestic jurisdiction would be available under general international law. The United States of America (in its declaration of 1946), and other states, have made 'automatic' reservations of the type reserving from the jurisdiction of the court disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States. This would appear to be incompatible with the Statute of the International Court of Justice, and more particularly art 36 para 6. The court itself has avoided determining the question when it has been raised: see the *Certain Norwegian Loans (France v Norway) (Preliminary Objections)* ICJ Reports 1957, 9; *Interhandel (Switzerland v United States of America) (Preliminary Objections)* ICJ Reports 1959, 6. Some judges have expressed the view that such a reservation is illegal and vitiates the declaration as a whole: see Judge Lauterpacht in the *Certain Norwegian Loans (France v Norway) (Preliminary Objections)* at 42 et seq; *Interhandel (Switzerland v United States of America) (Preliminary Objections)* at 97 et seq.

5 For the interpretation of this type of reservation see *Phosphates in Morocco* PCIJ Ser A/B No 74 (1938); *Electricity Co of Sofia and Bulgaria* PCIJ Ser A/B No 77 (1939); *Right of Passage over Indian Territory (Portugal v India) (Preliminary Objection)* ICJ Reports 1957, 125. For the United Kingdom reservation see the United Kingdom Declaration concerning the Optional Clause of the Statute of the International Court of Justice (note 3).

6 See the *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* ICJ Reports 1992, 240; *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* ICJ Reports 1991, 53.



7 *Electricity Co of Sofia and Bulgaria* PCIJ Ser A/B No 77 (1939); *Certain Norwegian Loans (France v Norway) (Preliminary Objections)* ICJ Reports 1957, 9. There are, however, limitations upon this: see *Right of Passage over Indian Territory (Portugal v India) (Preliminary Objection)* ICJ Reports 1957, 125 at 143, 147; *Interhandel (Switzerland v United States of America) (Preliminary Objections)* ICJ Reports 1959, 6.

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#### **506. Withdrawal, termination or variation of a declaration under optional clause.**

A state may withdraw or terminate its declaration under the optional clause if it has reserved the right to do so<sup>1</sup>. If a period of notice is specified in the declaration, its withdrawal will be valid if notice is given within that period<sup>2</sup>. If it has not reserved the right to do so, a state may withdraw its declaration if it gives notice of a reasonable length of time<sup>3</sup>. A state cannot, by withdrawing a declaration after the International Court of Justice<sup>4</sup> has been seised of a case, deprive the court of jurisdiction to hear it. Nor is the court, once seised of a case, deprived of jurisdiction by termination of the declaration by lapse of time<sup>5</sup>.

A state may, if it has reserved the right to do so, vary its declaration by adding new or cancelling existing reservations<sup>6</sup>. If it has not reserved the right to do so, it may not vary its declaration<sup>7</sup>.

1 The United Kingdom has reserved the right to do so: see PARA 505 note 3.

2 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* ICJ Reports 1984, 392 at 418.

3 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* ICJ Reports 1984, 392 at 420. The court said that this was by way of analogy with the Law of Treaties. The Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 56 para 2 requires 12 months' notice of termination. However, for limitations on the treaty analogy see the *Fisheries Jurisdiction (Spain v Canada)* ICJ Reports 1998, 127. As to the meaning of 'treaty' see PARA 71.

4 As to the International Court of Justice see PARA 499.

5 *Nottebohm (Liechtenstein v Guatemala) (Preliminary Objection)* ICJ Reports 1953, 111.

6 *Right of Passage over Indian Territory (Portugal v India) (Preliminary Objection)* ICJ Reports 1957, 125. However, the court stated that such a variation could not deprive it of jurisdiction over a case of which it had already been seised.

7 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* ICJ Reports 1984, 392.

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### 507. Admissibility.

The International Court of Justice<sup>1</sup> will not entertain a claim which is inadmissible<sup>2</sup>. Non-compliance with the nationality of claims rule<sup>3</sup> or the rule requiring exhaustion of local remedies<sup>4</sup> renders a claim inadmissible. The court will not deal with a case which is hypothetical and lacking in real purpose<sup>5</sup>, or has ceased to have any purpose<sup>6</sup>. The claimant state must have a sufficient legal interest of its own in the case<sup>7</sup>, otherwise it lacks standing to bring the case before the court<sup>8</sup>. The court will decline to hear the case if a legal interest of a state which is not a party thereto would form the very subject matter of its decision<sup>9</sup>. The court has no power to determine the jurisdiction of another tribunal, such as an arbitrator<sup>10</sup>.

1 As to the International Court of Justice see PARA 499.

2 Admissibility must be distinguished from jurisdiction. Lack of jurisdiction means that the court cannot hear a particular case at all; a claim which is inadmissible may become admissible, as for example, by exhaustion of local remedies: see the *Interhandel (Switzerland v United States of America) (Preliminary Objections)* ICJ Reports 1959, 6.

3 As to the nationality of claims see PARA 398 et seq.

4 As to exhaustion of local remedies see PARA 405 et seq.

5 *Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objection)* ICJ Reports 1963, 15 which was distinguished in *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* ICJ Reports 1992, 240.

6 *Nuclear Tests (Australia v France)* ICJ Reports 1974, 253; *Nuclear Tests (New Zealand v France)* ICJ Reports 1974, 457. The conclusion of an agreement between the parties to the case to establish a *modus vivendi* while the court is hearing the case does not, however, prevent the court from continuing to hear it since an actual dispute still exists: *Fisheries Jurisdiction (United Kingdom v Iceland)* ICJ Reports 1974, 3.

7 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* ICJ Reports 1966, 6.

8 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970, 3.

9 *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States of America) (Jurisdiction)* ICJ Reports 1954, 19; *East Timor (Portugal v Australia)* ICJ Reports 1995, 90. See also *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* ICJ Reports 1992, 240; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Preliminary Objections)* ICJ Reports 1998, 275. For the application of this principle to requests for advisory opinions see PARA 512. As to intervention by a third state see PARA 508.

10 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase) (Advisory Opinion)* ICJ Reports 1950, 65 at 71. This rule reflects the principle of equality of international tribunals. The court may, however, investigate the meaning of a treaty in order to determine whether the parties are under an obligation to refer a particular dispute to arbitration: *Ambatielos (Greece v United Kingdom) (Preliminary Objection)* ICJ Reports 1952, 28 at 39; *Ambatielos (Greece v United Kingdom)* ICJ Reports 1953, 10. As to the meaning of 'treaty' see PARA 71.

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### 508. Intervention.

A state has a right to intervene in a case in which it is not a party whenever the construction of a convention to which it is a party is involved; and if it does intervene the construction given by the judgment is binding on it<sup>1</sup>. The International Court of Justice<sup>2</sup> may permit a state to intervene in a case in which the state considers that it has an interest of a legal nature which may be affected by the decision in the case<sup>3</sup>. The intervening state does not become a party to the case, but only acquires the right to be heard<sup>4</sup>.

1 See the Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 63. The conditions were fulfilled in the *Haya de la Torre (Colombia/Peru)* ICJ Reports 1951, 71, but not in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Declaration of Intervention)* ICJ Reports 1984, 215. As to the Statute of the International Court of Justice see PARA 499 note 1.

2 As to the International Court of Justice see PARA 499.

3 Statute of the International Court of Justice art 62. The applicant state must show that it has an interest of a legal nature and that it could be affected by the decision in the case, the precise object of its intervention and any basis of jurisdiction between it and the parties: see Rules of Court (adopted 14 April 1978) art 81 para 2. The Rules of Court are contained in Acts and Documents concerning the Organisation of the Court No 2: see PARA 500 note 7. Intervention was permitted in eg the *SS 'Wimbledon'* PCIJ Ser A No 1 (1923); *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) (Application for Permission to Intervene)* ICJ Reports 1990, 92; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Application by Equatorial Guinea for Permission to Intervene)* ICJ Reports 1999, 1029. Permission was refused in eg *Nuclear Tests (Australia v France) (Application by Fiji to Intervene)* ICJ Reports 1973, 320 (case has become moot; see PARA 507 note 6); *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Application for Permission to Intervene)* ICJ Reports 1981, 3; *Continental Shelf (Libyan Arab Jamahiriya/Malta) (Application for Permission to Intervene)* ICJ Reports 1984, 3; and *Sovereignty over Pulau Ligatan and Pulau Sipadan (Indonesia/Malaysia) (Application to Intervene)* ICJ Reports 2001, 575.

4 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Declaration of Intervention)* ICJ Reports 1984, 215. The court does not need to have jurisdiction to determine cases brought between the states which are parties to the case and the intervening state: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) (Application for Permission to Intervene)* ICJ Reports 1990, 92; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Application by Equatorial Guinea for Permission to Intervene)* ICJ Reports 1999, 1029. As to the jurisdiction of the court see PARAS 503-506. Should the third state's legal interest be the very subject matter of the decision in the case, then the case itself is inadmissible under the principle stated in the *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States of America) (Jurisdiction)* ICJ Reports 1954, 19: see PARA 507.

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**509. Law applicable.**

The International Court of Justice<sup>1</sup>, whose function is to decide in accordance with international law such disputes as are submitted to it, must apply: (1) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (2) international custom, as evidence of a general practice accepted as law; (3) the general principles of law recognised by civilised nations; and (4) judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law<sup>2</sup>. This does not prejudice the court's power to decide a case *ex aequo et bono*, if the parties agree to it<sup>3</sup>.

1 As to the International Court of Justice see PARA 499.

2 Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 38 para 1. The reference to judicial decisions is subject to art 59, according to which the court's decision has no binding force except between the parties and in respect of that particular case, thus excluding any doctrine of *stare decisis*. The parties to the case may not, therefore, agree that the court is to decide the case in accordance with rules created by themselves for the purpose of the decision nor, save for art 38 para 2, may they require the court not to apply rules of international law. As to arbitration see PARA 492 et seq. For a discussion of the provisions of art 38 para 1, in the context of sources of international law, see PARA 2. As to the Statute of the International Court of Justice see PARA 499 note 1.

3 Statute of the International Court of Justice art 38 para 2. There have not been any cases in which the parties have agreed to this.

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### 510. Provisional measures.

The International Court of Justice<sup>1</sup> has the power to indicate, if it considers that circumstances so require, any provisional measures which must be taken to preserve the respective rights of the parties<sup>2</sup>. These measures may be indicated without prejudice to the question of whether the court has the jurisdiction to hear the case on its merits, provided that some instrument *prima facie* confers jurisdiction on the court<sup>3</sup>. The court has discretion whether or not to indicate provisional measures<sup>4</sup>. The rights which it is sought to protect by such measures must be those which are the subject matter of the proceedings before the court<sup>5</sup>. Provisional measures are binding upon the states to which they are addressed<sup>6</sup>.

1 As to the International Court of Justice see PARA 499.

2 The Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 41 para 1 provides that the Court may 'indicate' measures which 'ought to be taken', but the Court has interpreted an order of provisional measures as imposing binding international obligations upon the addressees: *LaGrand (Germany v United States of America)* ICJ Reports 2001, 466 at 501-506; see also note 6. Pending the final decision, notice of the measures suggested must forthwith be given to the parties and to the United Nations Security Council: art 41 para 2. As to the Statute of the International Court of Justice see PARA 499 note 1.

3 *Interhandel (Switzerland v United States of America) (Interim Protection)* ICJ Reports 1957, 105 at 118-119 per Sir Herch Lauterpacht; *Fisheries Jurisdiction (United Kingdom v Iceland) (Interim Protection)* ICJ Reports 1972, 12; *Nuclear Tests (Australia v France) (Interim Protection)* ICJ Reports 1973, 99; *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* ICJ Reports 1988, 69. See *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Provisional Measures)* ICJ Reports 1990, 64; *Passage through the Great Belt (Finland v Denmark) (Provisional Measures)* ICJ Reports 1991, 41; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Provisional Measures)* ICJ Reports 1993, 3; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case* ICJ Reports 1995, 288; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Provisional Measures)* ICJ Reports 1996, 13; *Vienna Convention on Consular Relations (Paraguay v United States of America)* ICJ Reports 1998, 248; *LaGrand (Germany v United States of America) (Provisional Measures)* ICJ Reports 1999, 9; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States Of America)* ICJ Reports, 19 January 2009.

4 Cases in which provisional measures were indicated include: the *Anglo-Iranian Oil Co Case (United Kingdom v Iran) (Preliminary Objections)* ICJ Reports 1952, 93; *Nuclear Tests (Australia v France) (Interim Protection)* ICJ Reports 1973, 99; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Provisional Measures)* ICJ Reports 1984, 169; *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran) (Provisional Measures)* ICJ Reports 1979, 7; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Provisional Measures)* ICJ Reports 1993, 3; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Provisional Measures)* ICJ Reports 1996, 13; *Vienna Convention on Consular Relations (Paraguay v United States of America) (Provisional Measures)* ICJ Reports 1998, 248; *LaGrand (Germany v United States of America) (Provisional Measures)* ICJ Reports 1999, 9; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States Of America)* ICJ Reports, 19 January 2009.

The court declined to indicate such measures in eg the *Aegean Sea Continental Shelf (Greece v Turkey) (Interim Protection)* ICJ Reports 1976, 3 (Greece's rights could not be affected nor would it suffer irreparable prejudice by Turkey's activities); *Passage through the Great Belt (Finland v Denmark) (Provisional Measures)* ICJ Reports 1991, 41 (the matter was not urgent); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Provisional Measures)* ICJ Reports 1992, 3 at 15 (Security Council Resolutions prevailed over the rights of Libya under the Convention and an indication of provisional measures might impair the rights of the United Kingdom and the

United States under those resolutions); *Legality of the Use of Force (Yugoslavia v Belgium) (Provisional Measures)* ICJ Reports 1999, 124.

5 *Arbitral Award of 31 July 1989 (Guinea Bissau v Senegal) (Provisional Measures)* ICJ Reports 1990, 64 (the rights must not merely be those which would be affected by the outcome of the proceedings). See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Provisional Measures)* ICJ Reports 1993, 3.

6 See the *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports, 19 January 2009.

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## 511. Judgments.

Upon the completion of the presentation of a case<sup>1</sup>, the International Court of Justice<sup>2</sup> retires to consider its judgments<sup>3</sup>. All questions are decided by a majority of the judges present<sup>4</sup>, and in the event of equality of votes the President or presiding judge has a casting vote<sup>5</sup>. The judgment, which must state the reasons upon which it is based<sup>6</sup>, must contain the names of the judges who took part in it<sup>7</sup>. Separate and dissenting judgments are permitted<sup>8</sup>.

Any dispute as to the meaning or scope of a judgment must be construed by the Court at the request of any party<sup>9</sup>. The Court may give a declaratory judgment<sup>10</sup>. The court's judgment is final and without appeal<sup>11</sup>. Its decision has no binding force except between the parties and in respect of the particular case<sup>12</sup>.

1 Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 54 para 1. As to the Statute of the International Court of Justice see PARA 499 note 1.

2 As to the International Court of Justice see PARA 499.

3 Statute of the International Court of Justice art 54 para 2. The deliberations are in private and remain secret: art 54 para 3. As to the court's practice considering its judgment see the Resolution concerning the Internal Judicial Practice of the Court made under Rules of Court art 33. The Resolution can be found in Acts and Documents concerning the Organization of the Court No 6. As to the Rules of Court see PARA 500 note 7.

4 Statute of the International Court of Justice art 55 para 1.

5 Statute of the International Court of Justice art 55 para 2. The President used his casting vote in the *Lotus Case* PCIJ Ser A No 10 (1927) and in the *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* ICJ Reports 1966, 6. As to the President of the International Court of Justice see PARA 499.

6 Statute of the International Court of Justice art 56 para 1.

7 Statute of the International Court of Justice art 56 para 2. It must be signed by the President and Registrar, and must be read in open court: art 58.

8 See the Statute of the International Court of Justice art 57.

9 Statute of the International Court of Justice art 60. See the *Asylum (Colombia/Peru)* ICJ Reports 1950, 266; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States Of America)* ICJ Reports, 19 January 2009.

10 See the *Factory at Chorzów (Interpretation)* PCIJ Ser A No 13 at 20 (1927); *Corfu Channel (United Kingdom v Albania)* ICJ Reports 1949, 4 at 34.

11 Statute of the International Court of Justice art 60. As to revision of a judgment see art 61; and eg *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* ICJ Reports 1985, 192; *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Yugoslavia v Bosnia and Herzegovina)* ICJ Reports 2003, 7; *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (El Salvador v Honduras) ICJ 2003, 392.

12 Statute of the International Court of Justice art 59. See *Certain German Interests in Polish Upper Silesia* PCIJ Ser A No 7 (1926). As to the obligation of a state member of the United Nations to comply with a decision, see the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 94.



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## 512. Advisory opinions.

The International Court of Justice<sup>1</sup> may give an advisory opinion upon any legal question<sup>2</sup> at the request of a body authorised to do so<sup>3</sup> by or in accordance with the Charter of the United Nations<sup>4</sup>. Other organs and specialised agencies may be authorised by the General Assembly to ask for an opinion on a legal question arising out of their activities<sup>5</sup>. The uses of advisory opinions are to assist the political organs of the United Nations to settle disputes and to provide guidance on points of law in connection with the functioning of those organs and specialised agencies.

In proceedings on requests for advisory opinions the court is guided by the provisions of the Statute of the International Court of Justice applicable in contentious cases between states to the extent to which it recognises them to be applicable<sup>6</sup>. The Court must give notice of a request for an advisory opinion to all states entitled to appear before it<sup>7</sup>, and to international organisations which it considers as likely to be able to furnish information on the matter<sup>8</sup>. Because there are no parties to the case, an advisory opinion technically has no binding force as *res judicata*; but it is nonetheless entitled to respect as a considered opinion on a question of law, given by the International Court of Justice after hearing argument and after deliberating.

1 As to the International Court of Justice see PARA 499.

2 Provided the question relates to a legal issue it is immaterial that it affects a political issue. See eg the *Certain Expenses of the United Nations (Advisory Opinion)* ICJ Reports 1962, 151 at 155; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136.

3 I.e. the General Assembly and the Security Council of the United Nations: Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 96 para 1.

4 Statute of the International Court of Justice (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 65 para 1. As to the Statute of the International Court of Justice see PARA 499 note 1.

5 Charter of the United Nations art 96 para 2. The Economic and Social Council and the Trusteeship Council have been so authorised. The following specialised agencies have been authorised: Inter-Governmental Maritime Consultative Organisation; International Bank for Reconstruction and Development; International Civil Aviation Organisation; International Labour Organisation; International Monetary Fund; International Telecommunication Union; International Trade Organisation; United Nations Educational, Scientific and Cultural Organisation; World Health Organisation. An advisory opinion was given to the Economic and Social Council: see *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Request for Advisory Opinion)* ICJ 1998, 423. It was refused to the World Health Organisation in *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ICJ Reports 1996, 66 on the ground that the question did not arise out of its activities. An Opinion was, however, given to the General Assembly on the same question: *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ICJ Reports 1996, 226. As to the specialised agencies of the United Nations see PARA 533. As to the Economic and Social Council see PARA 529.

6 Statute of the International Court of Justice art 68. The International Court of Justice must, above all, consider whether the request relates to a legal question pending between two or more states: Rules of Court (adopted 14 April 1978) art 102 para 2. The Rules of Court are contained in Acts and Documents concerning the Organisation of the Court No 2: see PARA 500 note 7. If it does, the court may decline to give an opinion when this would be tantamount to deciding an issue between them in the absence of one of them from the proceedings: *Eastern Carelia Case* PCIJ Ser B No 5 (1923). However, see the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase) (Advisory Opinion)* ICJ Reports 1950, 221; *Western Sahara (Advisory Opinion)* ICJ Reports 1975, 12; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136.

See also the Statute of the International Court of Justice art 89, which, by reference to art 31, gives the Court the right to allow a party to appoint an ad hoc judge in such a case. The court allowed the appointment of an ad hoc judge in the *Western Sahara (Advisory Opinion)* ICJ Reports 1975, 12, but not in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Request for Advisory Opinion)* ICJ Reports 1971, 359. As to ad hoc judges see PARA 500.

7 Statute of the International Court of Justice art 66 para 1.

8 Statute of the International Court of Justice art 66 para 2. States and organisations may make both written and oral observations: art 66 para 3.

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## ***B. OTHER PERMANENT INTERNATIONAL COURTS AND TRIBUNALS***

### **513. European Court of Human Rights.**

The European Court of Human Rights, which has its seat in Strasbourg, was established under the European Convention on Human Rights<sup>1</sup>. Each contracting state, of which there are currently 47, nominates three persons of whom one is elected by the parliamentary Assembly of the Council of Europe<sup>2</sup>. Judges sit in an individual capacity<sup>3</sup>, in committees of three judges, in Chambers of seven judges, and in Grand Chambers of seventeen judges, depending upon the nature of the case and question before them<sup>4</sup>. The court has jurisdiction in respect of cases alleging violations of rights protected by the European Convention on Human Rights that are brought against a state party either by another state party<sup>5</sup> or, more commonly, by an individual applicant<sup>6</sup>. Cases are admissible only after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken<sup>7</sup>. A state party has a right to intervene in cases in which its nationals are applicants<sup>8</sup>; and in the interests of the proper administration of justice the President of the Court may invite any other state party to intervene orally or in writing<sup>9</sup>. Judgments of the court are final and binding<sup>10</sup>, and states undertake to comply with the judgment in any case to which they are parties<sup>11</sup>. The court may also give advisory opinions on the interpretation of the European Convention on Human Rights and its Protocols, at the request of the Committee of Ministers of the Council of Europe<sup>12</sup>.

1 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 19. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 179 et seq.

2 See the Convention for the Protection of Human Rights and Fundamental Freedoms art 22. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 See the Convention for the Protection of Human Rights and Fundamental Freedoms art 21. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4 See the Convention for the Protection of Human Rights and Fundamental Freedoms arts 27-31. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

5 See the Convention for the Protection of Human Rights and Fundamental Freedoms art 33. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

6 See the Convention for the Protection of Human Rights and Fundamental Freedoms art 34. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

7 See the Convention for the Protection of Human Rights and Fundamental Freedoms art 35. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

8 See the Convention for the Protection of Human Rights and Fundamental Freedoms art 36. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

9 See the Convention for the Protection of Human Rights and Fundamental Freedoms art 36. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

10 See the Convention for the Protection of Human Rights and Fundamental Freedoms art 44. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

11 See the Convention for the Protection of Human Rights and Fundamental Freedoms art 46. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

12 See the Convention for the Protection of Human Rights and Fundamental Freedoms art 47. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

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#### **514. The International Tribunal for the Law of the Sea.**

A state may choose the International Tribunal for the Law of the Sea<sup>1</sup> as a means for the settlement of disputes concerning the United Nations Convention on the Law of the Sea<sup>2</sup>. The Tribunal consists of 21 independent members elected from among persons enjoying the highest reputation for fairness and integrity and of recognised competence in the field of the law of the sea<sup>3</sup>. The members of the Tribunal are elected by secret ballot<sup>4</sup> for nine years and may be re-elected<sup>5</sup>. All available members of the Tribunal must sit, and a quorum of 11 elected members is required to constitute the Tribunal<sup>6</sup>. The Tribunal may, however, form a chamber of three or more of its members for particular categories of disputes<sup>7</sup>; and it must form a chamber at the request of the parties for dealing with a particular dispute<sup>8</sup>. With a view to the speedy dispatch of business, the Tribunal must form annually a chamber composed of five of its elected members which may hear and determine disputes by summary procedure<sup>9</sup>. It must establish a Seabed Disputes Chamber<sup>10</sup> consisting of 11 members<sup>11</sup>, which itself must establish an ad hoc chamber of three members at the request of any party to a dispute falling within the jurisdiction of the Seabed Disputes Chamber<sup>12</sup>.

The Tribunal has the power to issue orders for provisional measures in respect of cases submitted to an arbitral tribunal constituted under the Convention on the Law of the Sea, in the period prior to the constitution of the arbitral tribunal<sup>13</sup>.

1 The International Tribunal for the Law of the Sea was established by the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; TS 81 (1999); Cmnd 4524) Annex VI. The Tribunal sits in Hamburg: see Annex VI art 1 para 2.

2 See the United Nations Convention on the Law of the Sea art 287 para 1(a).

3 United Nations Convention on the Law of the Sea Annex VI art 2 para 1. In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution is to be assured: Annex VI art 2 para 2. No two members of the Tribunal may be nationals of the same state: Annex VI art 3 para 1. There are to be no fewer than three members from each geographical group as established by the General Assembly of the United Nations: Annex VI art 3 para 2. When engaged on the business of the tribunal, its members enjoy diplomatic privileges and immunities: Annex VI art 10; and see PARA 267. As to diplomatic privileges and immunities in general see PARA 265 et seq.

4 United Nations Convention on the Law of the Sea Annex VI art 4 para 4. As to elections and nominations see Annex VI art 4.

5 United Nations Convention on the Law of the Sea Annex VI art 5 para 1. As to terms of office see Annex VI art 5. The Tribunal elects its President and Vice-President for three years: Annex VI art 12 para 1.

6 United Nations Convention on the Law of the Sea Annex VI art 13 para 1. The competence and jurisdiction of the Tribunal are provided for in Annex VI arts 20-23. The procedure of the Tribunal is provided for in Annex VI arts 24-34.

7 United Nations Convention on the Law of the Sea Annex VI art 15 para 1.

8 United Nations Convention on the Law of the Sea Annex VI art 15 para 2. The composition of such a chamber is determined by the tribunal with the approval of the parties: Annex VI art 15 para 2.

9 United Nations Convention on the Law of the Sea Annex VI art 15 para 3.

- 10 United Nations Convention on the Law of the Sea Annex VI art 14. The composition of the Seabed Disputes Chamber, access, the applicable law and the enforcement of its decisions are provided for in Annex VI arts 35-40.
- 11 United Nations Convention on the Law of the Sea Annex VI art 35 para 1.
- 12 United Nations Convention on the Law of the Sea Annex VI art 36 para 1. As to the jurisdiction of the Seabed Disputes Chamber see arts 186-188.
- 13 See the United Nations Convention on the Law of the Sea art 290(4).

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### **515. The World Trade Organisation Appellate Body.**

The Appellate Body consists of seven persons appointed by the World Trade Organisation Dispute Settlement Body, and it sits in divisions of three persons, selected by rotation<sup>1</sup>. It may uphold, modify or reverse the panel's legal findings<sup>2</sup>. An Appellate Body report must automatically be adopted by the Dispute Settlement Body and unconditionally accepted by the parties to the dispute unless the Dispute Settlement Body decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the members<sup>3</sup>.

It appears that the exhaustion of local remedies rule does not apply to such procedures<sup>4</sup>. Arbitration is permitted as an alternative means of dispute settlement<sup>5</sup>.

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the Dispute Settlement Body until the date the Dispute Settlement Body considers the appellate report for adoption must as a general rule not exceed 12 months where the report is appealed<sup>6</sup>. The member states involved must explain their intentions regarding compliance with recommendations contained in the Appellate Body report<sup>7</sup>. The Dispute Settlement Body keeps compliance under surveillance<sup>8</sup>. If a member state fails to comply with recommendations, the complainant state may request the authority of the Dispute Settlement Body to suspend the application to the defaulting member of concessions or other obligations<sup>9</sup>. If that member objects to the level of suspension authorised, the matter must be referred to arbitration<sup>10</sup>. The decision of the arbitrator is final<sup>11</sup>.

1 See the World Trade Organisation Agreement (Marrakesh, 15 April 1994; TS 57 (1996) Cm 3277), Annex 2 establishing the Understanding on Rules and Procedures Governing the Settlement of Disputes art 17 para 1. The Understanding applies to 'covered agreements' (ie agreements listed in Appendix 1 to the understanding): see art 1 para 1. The Dispute Settlement Body appoints persons to serve on the Appellate Body for a four-year term, and each person may be re-appointed once: art 17 para 2. The Appellate Body must comprise persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally: art 17 para 3. They must be unaffiliated with any government: art 17 para 3. The Appellate Body membership must be broadly representative of the membership of the World Trade Organisation: art 17 para 3. Proceedings of the Appellate Body are confidential (see art 17 para 10), as are communications with the Panel or the Appellate Body (see art 18). As to the Dispute Settlement Body see PARA 498.

2 World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 17 para 13.

3 World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 17 para 14.

4 As to exhaustion of local remedies see PARA 405 et seq.

5 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 25.

6 World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 20.

7 World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 21 para 3.

8 World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 21.

9 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 22 para 2.

10 See the World Trade Organisation Agreement Annex 2 establishing the Understanding on Rules and Procedures governing the Settlement of Disputes art 22 para 6.

11 See the World Trade Organisation Agreement Annex 2 establishing with Understanding on Rules and Procedures governing the Settlement of Disputes art 22 para 7.



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#### **516. Other permanent international tribunals.**

Permanent international tribunals have been established to hear various other types of case, including criminal cases<sup>1</sup> and appeals against cases determined by sports tribunals<sup>2</sup>, among others<sup>3</sup>.

1 See eg the Rome Statute of the International Criminal Court (Rome, 17 July 1998; TS No 35 (2002) Cm 5590); the International Criminal Court Act 2001; and PARA 437. There are also ad hoc international criminal tribunals for the former Yugoslavia and Rwanda established by the UN Security Council: see Security Council Resolutions 808 (1993) 22 February 1993 and 827 (1993) 25 May 1993, and 955 (1994) 8 November 1994 respectively; as well as a number of 'hybrid' or 'internationalised' criminal courts usually established by agreement between the United Nations and the interested state.

2 Eg the Court of Arbitration for Sport.

3 See generally the website of the Project on International Courts and Tribunals.

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## **17. INTERNATIONAL ORGANISATIONS**

### **(1) IN GENERAL**

#### **517. Law of international organisations.**

This part of this title is concerned with international intergovernmental organisations, almost always established by treaty, whose membership consists of states and sometimes other entities. It does not deal with international non-governmental organisations (NGOs).

The powers and functions of each international organisation are set out in its constituent instrument, and are specific to each organisation<sup>1</sup>. While each international organisation is unique, with its own constituent instrument and other rules (sometimes referred to as the 'internal law' of the organisation), there are certain common issues that arise and reference may therefore be made to a 'law of international organisations' (or, as it is sometimes called, 'international institutional law' or even 'common law of international organisations')<sup>2</sup>.

Certain aspects of the law of international organisations are covered elsewhere in this title<sup>3</sup>.

<sup>1</sup> See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* ICJ Reports 1996, 66. The constitutions of international organisations have various names, such as agreement, constitution, charter, covenant, etc; a common way of referring to them is as the 'constituent instrument' of the organisation concerned. As to the meaning of 'international organisation' see the International Law Commission ('ILC') Draft Articles on the Responsibility of International Organizations ('DARIO') art 2(a), International Law Commission Report, 61st Session (2009), A/64/10, ch IV.

<sup>2</sup> See Satow's *Diplomatic Practice* (6th Edn, 2009); Bowett's *Law of International Institutions* (6th Edn, 2009); Amerasinghe *Principles of the Institutional Law of International Organizations* (2nd Edn, 2005); Schermers and Blokker *International Institutional Law* (4th Edn, 2004). For a qualified reference to the notion of a common law of international organisations see *de Merode v World Bank* WBAT Reports [1981], Decision No 1, p 13.

<sup>3</sup> As to treaties see PARA 71 et seq. As to the international legal personality of international organisations see PARA 36. As to the privileges and immunities of international organisations see PARA 307 et seq. As to the responsibility of international organisations see PARA 327 et seq.

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### **518. International and European organisations generally.**

The United Kingdom is a member of various international and European organisations, such as the United Nations<sup>1</sup>, the North Atlantic Treaty Organisation<sup>2</sup>, the Organisation for Economic Co-operation and Development<sup>3</sup>, the Council of Europe<sup>4</sup>, and the European Union<sup>5</sup>.

1 As to the United Nations see PARAS 519-533.

2 The North Atlantic Treaty Organisation developed from the Brussels Treaty Organisation created by the Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence (Brussels, 17 March 1948; TS 1 (1949); Cmd 7599). The North Atlantic Treaty was signed at Washington on 4 April 1949 (TS 56 (1949); Cmd 7789). The following countries are members of the North Atlantic Treaty Organisation: Albania; Belgium; Bulgaria; Canada; Croatia; Czech Republic; Denmark; Estonia; France; Germany; Greece; Hungary; Iceland; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Norway; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Turkey; United Kingdom; United States.

3 The Organisation for Economic Co-operation and Development developed from the Organisation for European Economic Co-operation, which was created in 1948 to administer aid under the Marshall Plan for the reconstruction of Europe after the 1939-45 war: see the Convention for European Economic Co-operation (Paris, 16 April 1948; TS 59 (1949); Cmd 7796). The Organisation for Economic Co-operation and Development is a reconstitution of Organisation for European Economic Co-operation by the Convention on the Organisation for Economic Co-operation and Development (Paris, 14 December 1960; TS 21 (1962); Cmd 1646). The following countries are members of the Organisation for Economic Co-operation and Development: Australia; Austria; Belgium; Canada; Czech Republic; Denmark; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Italy; Japan; Republic of Korea; Luxembourg; Mexico; The Netherlands; New Zealand; Norway; Poland; Portugal; Slovak Republic; Spain; Sweden; Switzerland; Turkey; United Kingdom; United States. There is provision for co-operation between the European Union and the Organisation for Economic Co-operation and Development: see the Treaty on the Functioning of the European Union (Rome, 25 March 1957; TS 1 (1973); Cmd 5179) art 220. The Treaty was formerly known as the Treaty Establishing the European Community; it has been renamed and its provisions renumbered: see PARA 304 note 1.

4 As to the Council of Europe see PARA 534. The Council of Europe is a separate organisation from the European Union (see the text and note 5).

5 Since the Treaty of Lisbon Amending the Treaty Establishing the European Union and the Treaty Establishing the European Community (Lisbon, 13 December 2007, ECS 13 (2007); Cm 7294) (the 'Lisbon Treaty') came into force on 1 December 2009, all references to the Communities or the Community are replaced by references to the European Union (EU): see the European Union (Amendment) Act 2008. As a member of the European Union, the United Kingdom is represented on both the European Council and the Council of the European Union. The European Council consists of the heads of state or government of the member states of the European Union, and is distinct from the Council of the European Union which consists of national ministers.

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## **(2) THE UNITED NATIONS**

### **519. In general.**

The Charter of the United Nations<sup>1</sup> was signed at San Francisco on 26 June 1945, and entered into force on 24 October 1945<sup>2</sup>. It has been amended on three occasions<sup>3</sup>.

1     le the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015).

2     As to the United Nations see Satow's Diplomatic Practice (6th Edn, 2009); Simma *The Charter of the United Nations: A Commentary* (2nd Edn, 2002).

3     The amendments, adopted in 1963, 1965 and 1971 came into force in 1965, 1968 and 1973 respectively. Their effect was to enlarge the Security Council (see PARA 522) and the Economic and Social Council (see PARA 529), as well as to amend the procedure for reviewing and amending the Charter. As to the procedure for reviewing and amending the Charter of the United Nations see Ch XVIII (arts 108-109) (as subsequently amended).

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## **520. Membership.**

The membership of the United Nations comprises: (1) those states which participated in the United Nations Conference at San Francisco in 1945 or, having previously signed the Declaration by United Nations of 1 January 1942, signed and ratified the Charter of the United Nations<sup>1</sup>; and (2) all other peace-loving states which accept the obligations contained in the Charter and, in the judgment of the organisation, are willing and able to carry out these obligations<sup>2</sup>.

1     le in accordance with the provisions of the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 110: art 3.

2     Charter of the United Nations art 4 para 1. Admission is effected by the General Assembly upon the recommendation of the Security Council: art 4 para 2. For the criteria upon which admission should be based see *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* ICJ Reports 1950, 4. Provision is made for the suspension and expulsion of member states by the General Assembly on the recommendation of the Security Council: Charter of the United Nations arts 5, 6. There is no provision for withdrawal. As to the General Assembly see PARA 527 et seq. As to the Security Council see PARA 522 et seq.

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### **521. Principal organs.**

The principal organs of the United Nations are the General Assembly<sup>1</sup>, the Security Council<sup>2</sup>, the Economic and Social Council<sup>3</sup>, the Trusteeship Council<sup>4</sup>, the International Court of Justice<sup>5</sup> and the Secretariat<sup>6</sup>.

1 As to the General Assembly see PARA 527 et seq.

2 As to the Security Council see PARA 522 et seq.

3 As to the Economic and Social Council see PARA 529.

4 As to the Trusteeship Council see PARA 530.

5 As to the International Court of Justice see PARA 499 et seq.

6 Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 7 para 1. As to the Secretariat see PARA 531.

Subsidiary organs may be established in accordance with the Charter: art 7 para 2. The General Assembly and the Security Council have the power to establish subsidiary organs: arts 22, 29.

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## **522. Security Council: composition and decision-making.**

The Security Council consists of 15 members, namely the five permanent members (China, France, the Russian Federation, the United Kingdom and the United States) and ten other members elected by the General Assembly<sup>1</sup>. Each member has one representative<sup>2</sup>, and one vote<sup>3</sup>. Decisions are taken on procedural matters by an affirmative vote of nine members<sup>4</sup>. On all other matters decisions must be taken by an affirmative vote of nine members, including the concurring votes of the permanent members<sup>5</sup>.

1 Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 23 para 1 (art 23 amended: 17 December 1963; TS 2 (1966); Cmd 2900); and see General Assembly Resolution 1991 (XVIII) of 17 December 1963, Resolution A para 3. In electing the non-permanent members, the General Assembly must pay due regard, in the first instance, to the contribution of members to the maintenance of international peace and security and to the other purposes of the organisation, and also to equitable geographical distribution: see the Charter of the United Nations art 23(1). The non-permanent members are elected for two years: see art 23 para 2 (as so amended). As to the purposes of the United Nations see art 1. As to the General Assembly see PARA 527 et seq.

2 Charter of the United Nations art 23 para 3.

3 Charter of the United Nations art 27 para 1.

4 Charter of the United Nations art 27 para 2 (as amended: 17 December 1963; TS 2 (1966); Cmd 2900). There is no definition of 'procedural matters'. Under the Rules of Procedure, the President of the Council may rule that a matter is procedural. As to the procedure of the Council see the Charter of the United Nations arts 28-32.

5 Charter of the United Nations art 27 para 3 (as amended: 17 December 1963; TS 2 (1966); Cmd 2900). If a permanent member votes against on a non-procedural matter, which secures nine votes, that is a 'veto'. The practice of the Security Council has been to regard the abstention of a permanent member as not preventing decision and absence of such a member as having the same effect, as when the Union of Soviet Socialist Republics was absent in the Korean crisis of 1950. This practice was found to be lawful by the International Court of Justice: see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* ICJ Reports 1971, 16.

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### **523. Security Council: functions and powers.**

The Security Council<sup>1</sup> has primary responsibility for the maintenance of international peace and security<sup>2</sup>. The members of the United Nations agree that, in carrying out its duties in this respect, the Security Council acts on their behalf<sup>3</sup>. They agree to accept and carry out the Security Council's decisions<sup>4</sup> in accordance with the Charter of the United Nations<sup>5</sup>. In the event of a conflict between obligations under the Charter and obligations under any other international agreement, obligations under the Charter prevail<sup>6</sup>. For this purpose obligations under the Charter include obligations imposed by decisions of the Security Council<sup>7</sup>.

1 As to composition etc of the Security Council see PARA 522.

2 Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 24 para 1.

3 See the Charter of the United Nations art 24 para 1. For the Security Council's powers in this respect see art 24 para 2; Ch VI (arts 33-38); Ch VII (arts 39-51); Ch XII (arts 75-85).

4 A decision is binding in law upon the member states, but a recommendation is not. The Security Council may make decisions under Ch VII (see PARA 525) and may make recommendations under Ch VI (see PARA 524).

5 Charter of the United Nations art 25.

6 Charter of the United Nations art 103.

7 See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Provisional Measures)* ICJ Reports 1992, 3; *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, [2008] 3 All ER 28.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/17. INTERNATIONAL ORGANISATIONS/(2) THE UNITED NATIONS/524. Security Council: peaceful settlement of disputes.

#### **524. Security Council: peaceful settlement of disputes.**

The Security Council<sup>1</sup> may use various means to assist in the pacific settlement of disputes likely to endanger the maintenance of international peace and security<sup>2</sup>. It may investigate any dispute or situation in order to determine whether its continuance is likely to endanger the maintenance of international peace and security<sup>3</sup>. The General Assembly<sup>4</sup>, the Secretary-General<sup>5</sup> and member states<sup>6</sup> may submit disputes or situations of such character to the attention of the Security Council, and non-member states may submit disputes affecting them<sup>7</sup>. Member states are under a duty to refer such disputes to which they are party to the Council if they cannot settle them by other means<sup>8</sup>.

Once seised of a dispute, the Security Council must invite the parties to participate in the discussion of it, without a right to vote<sup>9</sup>. In addition to calling upon the states to settle their dispute by traditional means<sup>10</sup>, the Security Council may recommend a particular means of settlement<sup>11</sup> and, where the dispute involves international peace and security, may recommend the terms of settlement<sup>12</sup>. The Security Council may refer the dispute to an existing organ, for example the General Assembly<sup>13</sup>.

1 As to the composition etc of the Security Council see PARA 522.

2 Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 33 para 1. See Ch VI (arts 33-38). These are supplementary to negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means, which the parties must first employ for the solution of a dispute: see art 33 para 1; and PARA 490. The Security Council may call upon them to do so: art 33 para 2.

3 Charter of the United Nations art 34.

4 As to the General Assembly's powers see the Charter of the United Nations arts 11, 12. As to the General Assembly see PARA 527 et seq.

5 As to the Secretary-General's powers see the Charter of the United Nations art 99.

6 As to the powers of member states see the Charter of the United Nations art 35 para 1. As to membership of the United Nations see PARA 520.

7 Charter of the United Nations art 35 para 2. In submitting such a dispute, non-member states must accept in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the Charter of the United Nations: art 35 para 2.

8 Charter of the United Nations art 37 para 1.

9 Charter of the United Nations art 32. Any state whose interests are deemed to be affected may be invited to participate in the discussion of any question: art 31.

10 See the Charter of the United Nations art 33 para 2.

11 Charter of the United Nations art 36 para 1. The Security Council should take into consideration that, as a general rule, legal disputes should be referred by the parties to the International Court of Justice (the 'ICJ'): art 36 para 3. This was recommended in *Corfu Channel (United Kingdom v Albania) (Preliminary Objection)* ICJ Reports 1948, 15. The majority of the ICJ held that this did not of itself confer jurisdiction upon the court in respect of the dispute. As to the International Court of Justice see PARA 499 et seq.

12 Charter of the United Nations art 37 para 2. If the dispute is not of this nature, the Security Council could only act with the consent of the parties: art 38.

13 See the Charter of the United Nations art 12 para 1.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/17. INTERNATIONAL ORGANISATIONS/(2) THE UNITED NATIONS/525. Security Council: enforcement action.

## **525. Security Council: enforcement action.**

Where the Security Council<sup>1</sup> determines the existence of a threat to the peace, breach of the peace or act of aggression<sup>2</sup>, it may adopt one of several courses of action<sup>3</sup>. It may: (1) call upon the parties to comply with such provisional measures as it deems to be appropriate<sup>4</sup>; (2) decide upon, and call upon member states<sup>5</sup> to apply, measures (often referred to as 'sanctions')<sup>6</sup>, which may include interruption of economic relations and means of communication and the severance of diplomatic relations<sup>7</sup>; or (3) take such action by the use of armed forces as may be necessary to maintain or restore international peace and security<sup>8</sup>. Member states must join in giving mutual assistance in carrying out measures decided on by the Security Council<sup>9</sup>.

1 As to the composition of the Security Council see PARA 522.

2 *Ie* under the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 39. For the definition of 'aggression' adopted by the United Nations General Assembly see General Assembly Resolution 3314 (XXIX) of 14 December 1974. As to the General Assembly see PARA 527 *et seq*.

3 See the Charter of the United Nations Ch VII (arts 39-51).

4 Charter of the United Nations art 40. An example of such a measure might be a cease-fire.

5 As to membership of the United Nations see PARA 520.

6 *Ie* measures not involving the use of armed force pursuant to the Charter of the United Nations art 41.

7 Charter of the United Nations art 41. The Security Council first imposed measures under art 41 in respect of Southern Rhodesia: see Security Council Resolution 221 (1966), 9 April; Security Council Resolution 232 (1966), 16 December; Security Council Resolution 253 (1968), 29 May. It has subsequently decided upon measures under the Charter of the United Nations art 41 on many occasions. These have included the imposition of general trade sanctions; arms embargoes; targeted sanctions against individuals, including persons associated with particular regimes or associated with particular terrorist groups; the establishment of ad hoc international criminal tribunals; the requirement to hand over certain individuals for trial; the reference of a situation to the International Criminal Court; and other measures in connection with that court. As to the International Criminal Court see PARA 437 *et seq*.

8 Charter of the United Nations art 42. Article 43 envisages the conclusion of special agreements for the provision of armed forces with member states, and only in respect of such agreements are member states legally obliged to comply with an order for the supply of armed forces. However, the absence of such agreements does not invalidate measures taken under art 43 with the voluntary co-operation of member states: *Certain Expenses of the United Nations (Advisory Opinion)* ICJ Reports 1962, 151 at 166, 171-172, 177.

9 Charter of the United Nations art 49.

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**526. Application of Security Council measures by the United Kingdom.**

Her Majesty may make such provision by Order in Council as appears necessary or expedient for enabling the effective application of any measures which the United Kingdom<sup>1</sup> government is called upon to apply<sup>2</sup> by the Security Council of the United Nations<sup>3</sup>.

1 As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

2 See the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 41 (measures not involving the use of force); see PARA 525.

3 See the United Nations Act 1946 s 1(1). As to the provisions made in the United Kingdom under this power see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 808. See *A v HM Treasury* [2010] UKSC 2, [2010] All ER (D) 179 (Jan). As to the composition of the Security Council see PARA 522.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/17. INTERNATIONAL ORGANISATIONS/(2) THE UNITED NATIONS/527. General Assembly: composition and decision-making.

**527. General Assembly: composition and decision-making.**

The General Assembly consists of all the members of the United Nations<sup>1</sup>. Each member of the General Assembly has one vote<sup>2</sup>. Voting on important questions<sup>3</sup> is by a two-thirds majority of the members present and voting<sup>4</sup>. Decisions on other questions are made by a simple majority of the members present and voting<sup>5</sup>.

1 Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 9 para 1. As to membership to the United Nations see PARA 520.

2 Charter of the United Nations art 18 para 1. For the voting rights of members in arrears with their contributions to the organisation see art 19.

3 'Important questions' include recommendations respecting the maintenance of international peace and security; the election of new members of the principal organs; the admission of new members; the suspension and expulsion of members; questions relating to the operation of the trusteeship system; and budgetary questions: Charter of the United Nations art 18 para 2.

4 Charter of the United Nations art 18 para 2.

5 Charter of the United Nations art 18 para 3. These include the determination of additional categories of questions to be decided by a two-thirds majority: art 18 para 3.

Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/17. INTERNATIONAL ORGANISATIONS/(2) THE UNITED NATIONS/528. General Assembly: functions and powers.

### **528. General Assembly: functions and powers.**

The General Assembly<sup>1</sup> may discuss any matters within the scope of the Charter of the United Nations<sup>2</sup> or relating to the powers and functions of any United Nations organs and may make recommendations to the member states<sup>3</sup> or the Security Council<sup>4</sup> on such questions or matters<sup>5</sup>. It may discuss any question relating to the maintenance of international peace and security<sup>6</sup>. Such questions may be brought before the General Assembly by any member state and non-member state, or by the Security Council; and the General Assembly may make recommendations with regard to any such question<sup>7</sup>. Further, the General Assembly may make recommendations with regard to the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair general welfare among nations<sup>8</sup>. The General Assembly's powers in these respects are limited in that it may not make any recommendation with regard to a dispute or situation in respect of which the Security Council is exercising the functions assigned to it unless the Security Council so requests<sup>9</sup>, and any question upon which action is necessary must be referred to the Security Council<sup>10</sup>.

The General Assembly also has various other functions<sup>11</sup>, including the power to consider and approve the organisation's budget<sup>12</sup> and to apportion the organisation's expenses among the members<sup>13</sup>.

1 As to the General Assembly see PARA 527 et seq.

2 I.e. the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015).

3 As to membership of the United Nations see PARA 520.

4 As to the Security Council see PARA 522 et seq.

5 Charter of the United Nations art 10.

6 See the Charter of the United Nations art 11 para 2.

7 Charter of the United Nations art 11 para 2. See also art 11 para 1.

8 Charter of the United Nations art 14.

9 Charter of the United Nations art 12 para 1. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004, 136.

10 Charter of the United Nations art 11 para 2.

11 See the Charter of the United Nations arts 13, 15, 16.

12 Charter of the United Nations art 17 para 1.

13 Charter of the United Nations art 17 para 2. As to the organisation's expenses in connection with peace-keeping operations authorised by the General Assembly and the Security Council see *Certain Expenses of the United Nations (Advisory Opinion)* ICJ Reports 1962, 151.

The General Assembly also has powers in relation to the financial and budgetary affairs of the organisation's specialised agencies: see the Charter of the United Nations art 17 para 3.

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### **529. Economic and Social Council.**

The Economic and Social Council of the United Nations consists of 54 members elected for a term of three years<sup>1</sup>. Each member has one representative<sup>2</sup> and one vote<sup>3</sup>. Decisions are taken by a majority of the members present and voting<sup>4</sup>. The Council's principal functions lie in the field of international economic and social co-operation<sup>5</sup>, in particular in respect of the activities of the specialised agencies<sup>6</sup>. The Council's competence is limited to discussion and the making of reports, and it is placed under the overall authority of the General Assembly<sup>7</sup>.

1 Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 61 (substituted 20 December 1971; TS 130 (1973); Cmd 5511).

2 Charter of the United Nations art 61 para 4 (as substituted: see note 1).

3 Charter of the United Nations art 67 para 1.

4 Charter of the United Nations art 67 para 2.

5 As to the objects of the United Nations in this field and the duties of member states, together with the general relationship of the United Nations with the specialised agencies, see the Charter of the United Nations Ch IX (arts 55-60).

6 For the functions and powers of the Council see the Charter of the United Nations arts 62-66. As to the specialised agencies see PARA 533.

7 As to the General Assembly see PARA 527 et seq.

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### **530. Trusteeship Council.**

The Trusteeship Council suspended its operation in 1 November 1994, having completed its task under the Charter of the United Nations<sup>1</sup> with the independence of the last trust territory<sup>2</sup> on 1 October 1994.

<sup>1</sup> I.e. the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) Chs XII, XIII (arts 75-91).

<sup>2</sup> I.e. Palau.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/17. INTERNATIONAL ORGANISATIONS/(2) THE UNITED NATIONS/531. Secretariat.

### **531. Secretariat.**

The United Nations Secretariat consists of a Secretary-General and such staff as the organisation may require<sup>1</sup>. The Secretary-General is appointed by the General Assembly on the recommendation of the Security Council<sup>2</sup>. He is the chief administrative officer of the United Nations<sup>3</sup> and acts in this capacity at all meetings of the other principal organs<sup>4</sup>. He may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security<sup>5</sup>. The Secretary-General and staff are international officials responsible only to the organisation<sup>6</sup>. Employment disputes between staff members and the United Nations are dealt with internally<sup>7</sup>; the organisation has immunity from the jurisdiction of national courts in this as in other respects<sup>8</sup>.

1 Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 97. The staff are appointed by the Secretary-General under regulations established by the General Assembly: art 101 para 1. As to the General Assembly see PARA 527 et seq.

2 Charter of the United Nations art 97. There is no fixed term of office. As to the Security Council see PARA 522 et seq.

3 Charter of the United Nations art 97.

4 Charter of the United Nations art 98. As to the principal organs see PARA 521. This does not apply to the International Court of Justice. As to the International Court of Justice see PARA 499 et seq.

5 Charter of the United Nations art 99.

6 Charter of the United Nations art 100 para 1.

7 Since 1 July 2009, this has involved a two-tier judicial system (consisting of a United Nations Dispute Tribunal and a United Nations Appeal Tribunal): see General Assembly Resolution 62/228 of 6 February 2008.

8 See PARA 307 et seq.

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### **532. Protection of United Nations personnel.**

If a person does outside the United Kingdom<sup>1</sup> any act<sup>2</sup> to or in relation to a United Nations worker<sup>3</sup> which, if he had done it in any part of the United Kingdom, would have made him guilty in that part of the United Kingdom of an offence of a specified description, he is guilty in that part of the United Kingdom of that offence<sup>4</sup>. The offences in question are: (1) murder, manslaughter, culpable homicide, rape, assault causing injury, kidnapping, abduction and false imprisonment<sup>5</sup>; (2) an offence under certain provisions of the Offences Against the Person Act 1861<sup>6</sup>; or (3) an offence under the Explosive Substances Act 1883<sup>7</sup>.

If a person does outside the United Kingdom any act, in connection with an attack on relevant premises<sup>8</sup> or on a vehicle<sup>9</sup> ordinarily used by a United Nations worker which is made when a United Nations worker is on or in the premises or vehicle, which, if he had done it in any part of the United Kingdom, would have made him guilty of certain offences<sup>10</sup>, he will in that part of the United Kingdom be guilty of an offence<sup>11</sup>.

A person in the United Kingdom or elsewhere is guilty of an offence<sup>12</sup> if, in order to compel a person to do or abstain from doing any act, he: (a) makes to a person a threat that any person will do an act which is an offence of a specified kind<sup>13</sup>; and (b) intends that the person to whom he makes the threat will fear that it will be carried out<sup>14</sup>.

A person is guilty of an offence under or by virtue of the above provisions<sup>15</sup> regardless of his nationality<sup>16</sup>; and, for the purposes of those provisions, it is immaterial whether or not a person knows that another person is a United Nations worker<sup>17</sup>. Provision is made as to the institution of proceedings<sup>18</sup>. The provisions may be extended by Order in Council to any of the Channel Islands, the Isle of Man or any colony<sup>19</sup>.

1 As to the statutory meaning of 'United Kingdom' see PARA 30 note 3.

2 For the purposes of the United Nations Personnel Act 1997, 'act' includes omission: s 8.

3 For the purposes of the United Nations Personnel Act 1997, a person is a United Nations worker in relation to an alleged offence if at the time of the alleged offence: (1) he is engaged or deployed by the Secretary-General of the United Nations as a member of the military, police or civilian component of a United Nations operation; (2) he is, in his capacity as an official or expert on mission of the United Nations, a specialised agency of the United Nations or the International Atomic Energy Agency, present in an area where a United Nations operation is being conducted; (3) he is assigned, with the agreement of an organ of the United Nations, by the government of any state or by an international governmental organisation to carry out activities in support of the fulfilment of the mandate of a United Nations operation; (4) he is engaged by the Secretary-General, a specialised agency or the International Atomic Energy Agency to carry out such activities; or (5) he is deployed by a humanitarian non-governmental organisation or agency under an agreement with the Secretary-General, with a specialised agency or with the International Atomic Energy Agency to carry out such activities: ss 4(1), 8. As to the Secretary-General see PARA 531. 'Specialised agency' has the meaning assigned to it by the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) art 57 (see PARA 533): United Nations Personnel Act 1997 s 4(4).

'United Nations operation' means an operation which: (a) is established, in accordance with the Charter of the United Nations, by an organ of the United Nations; (b) is conducted under the authority and control of the United Nations; and (c) has as its purpose the maintenance or restoration of international peace and security or has, for the purposes of the Convention on the Safety of United Nations and Associated Personnel adopted by the General Assembly of the United Nations on 9 December 1994 (New York, 9 December 1994, TS 92 (2000); Cm 4803), been declared by the Security Council or the General Assembly of the United Nations to be an operation where there exists an exceptional risk to the safety of the participating personnel: United Nations Personnel Act 1997 s 4(2), (4). It does not include any operation which is authorised by the Security Council as an enforcement action under the Charter of the United Nations Ch VII (arts 39-51) (see PARA 525), and in which

United Nations workers are engaged as combatants against organised armed forces, and to which the law of international armed conflict applies: United Nations Personnel Act 1997 s 4(3). As to the Security Council see PARA 522 et seq. As to the General Assembly see PARA 527 et seq. As from a day to be appointed, instead of referring to the maintenance or restoration of international peace and security, head (c) is to refer to the purposes of maintaining or restoring international peace and security, delivering humanitarian, political or development assistance in peace building, and delivering emergency humanitarian assistance; and the definition of 'United Nations operation' will also not include any operation in respect of which a declaration is made in accordance with art II(3) of the Optional Protocol to the Convention adopted by the General Assembly of the United Nations on 8 December 2005 (New York, 8 December 2005; Misc 12 (2009); Cm 7733) (opt-out for operation to deliver emergency humanitarian assistance in response to natural disaster): see the United Nations Personnel Act 1997 s 4(2), (2A), (3A), (4) (s 4(2), (4) prospectively amended, and s 4(2A), (3A) prospectively added, by the Geneva Conventions and United Nations Personnel (Protocols) Act 2009 s 2). At the date at which this volume states the law, no such day had been appointed.

If, in any proceedings, a question arises as to whether a person is or was a United Nations worker, or whether an operation is or was a United Nations operation, a certificate issued by or under the authority of the Secretary of State and stating any fact relating to the question is conclusive evidence of that fact: United Nations Personnel Act 1997 s 4(5).

4 United Nations Personnel Act 1997 s 1(1).

5 United Nations Personnel Act 1997 s 1(2)(a).

6 United Nations Personnel Act 1997 s 1(2)(b). The offences referred to in the text are those under the Offences Against the Person Act 1861 s 18, s 20, s 21, s 22, s 23, s 24, s 28, s 29, s 30 or s 47 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**): see the United Nations Personnel Act 1997 s 1(2)(b).

7 United Nations Personnel Act 1997 s 1(2)(c). The offence referred to in the text is that under the Explosive Substances Act 1883 s 2 (see **EXPLOSIVES**): see the United Nations Personnel Act 1997 s 1(2)(c).

8 'Relevant premises' means premises at which a United Nations worker resides or is staying or which a United Nations worker uses for the purpose of carrying out his functions as such a worker: United Nations Personnel Act 1997 s 2(3).

9 'Vehicle' includes any means of conveyance: United Nations Personnel Act 1997 s 2(3).

10 The offences referred to are: (1) an offence under the Explosive Substances Act 1883 s 2 (see **EXPLOSIVES**); (2) an offence under the Criminal Damage Act 1971 s 1 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**); (3) an offence under the Criminal Damage (Northern Ireland) Order 1977, SI 1977/426 (NI 1) art 3; and (4) wilful fire-raising: see the United Nations Personnel Act 1997 s 2(2).

11 United Nations Personnel Act 1997 s 2(1).

12 United Nations Personnel Act 1997 s 3(1).

13 The specified offence is an offence mentioned in the United Nations Personnel Act 1997 s 1(2) (see heads (1)-(3) in the text) against a United Nations worker, or an offence mentioned in s 2(2) (see note 10) in connection with such attack as is mentioned in s 2(1) (see the text and notes 8-11): see s 3(2).

14 United Nations Personnel Act 1997 s 3(2). A person guilty of an offence under s 3 is liable on conviction on indictment to imprisonment for a term not exceeding ten years, and not exceeding the term of imprisonment to which a person would be liable for the offence constituted by doing the act threatened at the place where the conviction occurs and at the time of the offence to which the conviction relates: s 3(3).

15 Ie the United Nations Personnel Act 1997 ss 1-3: see the text and notes 1-14.

16 United Nations Personnel Act 1997 s 5(3).

17 United Nations Personnel Act 1997 s 5(4).

18 Proceedings for an offence which (disregarding the provisions of the Internationally Protected Persons Act 1978, the Suppression of Terrorism Act 1978, the Nuclear Materials (Offences) Act 1983 and the Terrorism Act 2000) would not be an offence apart from the United Nations Personnel Act 1997 s 1, s 2 or s 3 (see the text and notes 1-14) must not be begun except by or with the consent of the Attorney General: s 5(1) (amended by the Crime (International Co-operation) Act 2003 Sch 5 paras 66, 67).

19 United Nations Personnel Act 1997 s 9(2). The following orders have been made: the United Nations Personnel (Guernsey) Order 1998, SI 1998/1075; the United Nations Personnel (Jersey) Order 1998, SI 1998/1267; and the United Nations Personnel (Isle of Man) Order 1998, SI 1998/1509.



Halsbury's Laws of England/INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010) 5TH EDITION)/17. INTERNATIONAL ORGANISATIONS/(3) THE SPECIALISED AGENCIES/533. Specialised agencies of the United Nations.

### (3) THE SPECIALISED AGENCIES

#### 533. Specialised agencies of the United Nations.

The specialised agencies of the United Nations are not part of the United Nations, being separate international organisations with their own legal personalities, but they nevertheless are brought into relationship with the United Nations<sup>1</sup>. The United Kingdom is a member of most of the specialised agencies. The specialised financial agencies of the United Nations to which the United Kingdom belongs are: (1) the International Bank for Reconstruction and Development<sup>2</sup>; (2) the International Development Association<sup>3</sup>; (3) the International Finance Corporation<sup>4</sup>; (4) the Multilateral Investment Guarantee Agency<sup>5</sup>; and (5) the International Monetary Fund<sup>6</sup>. In addition the United Kingdom belongs to the following specialised agencies of the United Nations: (a) the Food and Agriculture Organisation of the United Nations<sup>7</sup>; (b) the International Maritime Organisation<sup>8</sup>; (c) the International Civil Aviation Organisation<sup>9</sup>; (d) the International Labour Organisation<sup>10</sup>; (e) the International Telecommunication Union<sup>11</sup>; (f) the United Nations Educational, Scientific and Cultural Organisation<sup>12</sup>; (g) the Universal Postal Union<sup>13</sup>; (h) the World Health Organisation<sup>14</sup>; (i) the World Meteorological Organisation<sup>15</sup>; (j) the World Intellectual Property Organisation<sup>16</sup>; (k) the International Fund for Agricultural Development<sup>17</sup>; and (l) the United Nations Industrial Development Organisation<sup>18</sup>.

The International Atomic Energy Agency, though not a specialised agency, stands in a similar relationship to the United Nations<sup>19</sup>.

1 See the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) arts 57, 63. See Satow's Diplomatic Practice (6th Edn, 2009). The United Nations makes recommendations for the co-ordination of the policies and activities of the specialised agencies: see the Charter of the United Nations art 58. As to the responsibility for the discharge of these functions of the United Nations by the General Assembly, and under the General Assembly by the Economic and Social Council see art 60 and Ch X (arts 61-72). As to the privileges and immunities of the specialised agencies see the Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations (21 November 1947; TS 69 (1959); Cmd 855). As to the General Assembly see PARA 527 et seq. As to the Economic and Social Council see PARA 529.

2 The International Bank for Reconstruction and Development was created at the Bretton Woods Conference in 1944. As to its constitution see the Articles of Agreement of the International Bank for Reconstruction and Development (Washington, 27 December 1945; TS 21 (1946); Cmd 6885). See further **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1391-1392.

3 The International Development Association was created in 1960 as an affiliate of the International Bank for Reconstruction and Development and, for operational purposes, is at one with that agency. As to its constitution see the Articles of Agreement of the International Development Organisation (Washington, 29 January 1960; TS 1 (1961); Cmd 1244). See further **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1391-1392.

4 The International Finance Corporation was created in 1955. It is an affiliate of the International Bank for Reconstruction and Development. As to its constitution see the Articles of Agreement of the International Finance Corporation (Washington, 25 May 1955; TS 37 (1961); Cmd 1377). See further **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1391-1392.

5 The Multilateral Investment Guarantee Agency was created in 1985. As to its constitution see the Convention Establishing the Multilateral Investment Guarantee Agency (Seoul, 11 October 1985; TS 47 (1989); Cm 812). See also the Multilateral Investment Guarantee Agency Act 1988.

6 The International Monetary Fund was created at the Bretton Woods Conference in 1944. The constitution of the International Monetary Fund can be found in the Articles of Agreement of the International Monetary Fund (Washington, 27 December 1945; TS 21 (1946); Cmd 6885). See the International Monetary Fund Act 1979; and

**FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1391. As to European financial and economic co-operation see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1396 et seq.

7 The Food and Agriculture Organisation of the United Nations was founded in 1945 to replace the International Institute of Agriculture. As to its constitution see the Constitution of the Food and Agriculture Organisation of the United Nations (Quebec, 16 October 1945; TS 47 (1946); Cmd 6955).

8 The International Maritime Organisation (formerly the Inter-Governmental Maritime Consultative Organisation) was founded in 1948 but did not come into existence until 1957. As to its constitution see the Convention for the Establishment of the Inter-Governmental Maritime Consultative Organisation (Geneva, 6 March 1948; TS 54 (1958); Cmd 589). See also **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 13. As to the relevant headquarters agreement with the United Kingdom see PARA 308 note 1.

9 The International Civil Aviation Organisation was founded in 1944. Its constitution is part of the Convention on International Civil Aviation (Chicago, 7 December 1944; TS 8 (1955); Cmd 8742). As to the Chicago Convention see **AIR LAW** vol 2 (2008) PARA 2 et seq.

10 The constitution of the International Labour Organisation was originally annexed to the Treaty of Peace with Germany (the 'Treaty of Versailles') (Versailles, 28 June 1919; TS 4 (1919); Cmd 153). It was amended by the Constitution of the International Labour Organisation Instrument of Amendment 1946 (Montreal, 9 October 1946; TS 47 (1948); Cmd 7452), to which the revised constitution is annexed, and was amended further by instruments (Geneva, 25 June 1953; TS 59 (1961); Cmd 1428; Geneva, 22 June 1962; TS 9 (1964); Cmd 2259; Geneva, 22 June 1972; TS 110 (1975); Cmd 6207).

11 The International Telecommunication Union was founded in 1932. As to its constitution see the International Telecommunications Convention (Madrid, 9 December 1932; 151 LNTS 5) which was radically revised by the International Telecommunication Convention (Montreux, 12 November 1965; TS 41 (1967); Cmd 3383), by the International Telecommunication Convention (Malaga, 25 October 1973; TS 104 (1975); Cmd 6219), and by the International Telecommunication Convention 1982 (Nairobi, 6 November 1982; TS 33 (1985); Cmd 9557). See also **TELECOMMUNICATIONS** vol 97 (2010) PARA 65.

12 The United Nations Educational, Scientific and Cultural Organisation was founded in 1945. As to its constitution see the Constitution of the United Nations Educational, Scientific and Cultural Organisation (London, 16 November 1945; TS 36 (1961); Cmd 1376). As to educational, scientific and cultural institutions generally see **EDUCATION; NATIONAL CULTURAL HERITAGE**.

13 The Universal Postal Union was originally founded in 1874, but its present constitution is found in the Constitution of the Universal Postal Union (Vienna, 10 July 1964; TS 70 (1966); Cmd 3141). See also the Additional Protocol (Tokyo, 14 November 1969; TS 72 (1973); Cmd 5358); the Universal Postal Convention (Tokyo, 14 November 1969; TS 73 (1973); Cmd 5357); the Universal Postal Convention (Lausanne, 5 July 1974; TS 57 (1976); Cmd 6538); the Second Additional Protocol (Lausanne, 5 July 1974; TS 56 (1976); Cmd 6539); and the Third Additional Protocol (TS 81 (1991); Cm 1748). See further **POST OFFICE** vol 36(2) (Reissue) PARA 11.

14 The World Health Organisation was founded in 1946 and assumed the functions of the International Office of Public Health. As to its constitution see the Constitution of the World Health Organisation (New York, 22 July 1946; TS 43 (1948); Cmd 7458).

15 The World Meteorological Organisation was founded in 1947. As to its constitution see the Convention of the World Meteorological Organisation (Washington, 11 October 1947; TS 36 (1950); Cmd 7989).

16 The World Intellectual Property Organisation was established in 1967. As to its constitution see the Convention establishing the World Intellectual Property Organisation (WIPO) (Stockholm, 14 July 1967 to 13 January 1968; TS 52 (1970); Cmd 4408).

17 The International Fund for Agricultural Development was established in 1977. As to its constitution see the Agreement Establishing the International Fund for Agricultural Development (Rome, 13 June 1976; TS 41 (1978); Cmd 7195).

18 The United Nations Industrial Development Organisation was established by the General Assembly of the United Nations in 1966. It became a specialised agency in 1985 with the entry into force of the Constitution of the United Nations Industrial Development Organisation (Vienna, 8 April 1979).

19 The International Atomic Energy Agency was founded in 1956. As to its constitution see the Statute of the International Atomic Energy Agency (New York, 26 October 1956; TS 19 (1958); Cmd 450). See further **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1354.

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## (4) THE COUNCIL OF EUROPE

### 534. The Council of Europe.

The Council of Europe was created in 1949<sup>1</sup> in order to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress<sup>2</sup>. This is pursued by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters, and in the maintenance and further realisation of human rights and fundamental freedoms<sup>3</sup>. The main organs are: (1) the Committee of Ministers, consisting of the respective ministers for foreign affairs of the members states or their alternates or deputies<sup>4</sup>, which is charged, among other matters, with supervising the execution of the judgments of the European Court of Human Rights<sup>5</sup>; and (2) the Parliamentary Assembly whose members are appointed by the legislatures of the member states<sup>6</sup>, and whose function is deliberative<sup>7</sup>. Both these organs are to be served by the Secretariat of the Council<sup>8</sup>. The Council has been active in the formulation of conventions, agreements and protocols<sup>9</sup>. Among these are the conventions relating to human rights<sup>10</sup> and state immunity<sup>11</sup>, and the European Social Charter<sup>12</sup>.

1 See the Statute of the Council of Europe (London, 5 May 1949; TS 51 (1949); Cmd 7778). The following countries are members of the Council of the European Union: Albania; Andorra; Armenia; Austria; Azerbaijan; Belgium; Bosnia and Herzegovina; Bulgaria; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Georgia; Germany; Greece; Hungary; Iceland; Ireland; Italy; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; Moldova; Monaco; Montenegro; Netherlands; Norway; Poland; Portugal; Romania; Russian Federation; San Marino; Serbia; Slovak Republic; Slovenia; Spain; Sweden; Switzerland; the former Yugoslav Republic of Macedonia; Turkey; Ukraine; United Kingdom. There is provision for co-operation between the European Union and the Council of Europe: see the Treaty on the Functioning of the European Union (Rome, 25 March 1957; TS 1 (1973); Cmd 5179) art 220. The Treaty was formerly known as the Treaty Establishing the European Community; it has been renamed and its provisions renumbered: see PARA 304 note 1.

2 Statute of the Council of Europe art 1 para (a). Matters relating to the national defence do not fall within the scope of the Council of Europe: art 1 para (d).

3 Statute of the Council of Europe art 1 para (b).

4 See the Statute of the Council of Europe art 14. As to the Committee of Ministers see Ch IV (arts 13-21).

5 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 46 (as amended by Protocol 11); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 180.

6 See the Statute of the Council of Europe art 25 para (a). The Assembly consists of representatives from each member state, each member state being represented by a number in proportion to its population. The United Kingdom is entitled to 18 representatives: see art 26.

7 See the Statute of the Council of Europe art 22. As to the Assembly see Ch V (arts 22-35).

8 Statute of the Council of Europe art 10. As to the Secretariat see Ch VI (arts 36, 37).

9 There are more than 200 of these published in the European Treaty Series (ETS Nos 1 to 193) and Council of Europe Treaty Series (CETS No 194 et seq).

10 See the Convention for the Protection of Human Rights and Fundamental Freedoms: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 122 et seq.

11 See the European Convention on State Immunity (Basle, 16 May 1972; Misc 31 (1972); Cmnd 5081): see PARA 242.

12 See the European Social Charter (Turin, 18 October 1961; TS 38 (1965); Cmnd 2643).